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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 597, Misc.

IN THE MATTER OF THE PETITION OF THE FEDERAL SECURITY ADMINISTRATOR AND THE ATTORNEY GENERAL FOR WRITS OF PROHIBITION AND/OR MANDAMUS

MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF PROHIBITION AND/OR MANDAMUS AND PETITIONS ON BEHALF OF THE FEDERAL SECURITY ADMINISTRATOR AND THE ATTORNEY GENERAL FOR WRITS OF PROHIBITION AND MANDAMUS

Philip B. Perlman, Solicitor General of the United States, on behalf of the Federal Security Administrator and the Attorney General of the United States, moves:

1. For leave to file the petition for a writ of prohibition and for a writ of mandamus hereto annexed, and

2. That a rule be entered and issued directing the Honorable Bennett Champ Clark, Associate Judge of the United States Court of Appeals for the District of Columbia Circuit, and the Honorable Alan [illegible]. Goldsborough, and the Honorable Edward A. Tamm, United States District Judges for the District of Columbia, who have been designated as a district court of three judges under

28 U. S. C. 2284 to hear and determine a case entitled *Mytinger & Casselberry, Inc.*, vs. *Oscar R. Ewing, Federal Security Administrator, Paul B. Dunbar, Commissioner of Food and Drugs, Charles W. Crawford, Associate Commissioner of Food and Drugs, George P. Larrick and Louis D. Elliott, Assistant Commissioners of Food and Drugs, and Tom C. Clark, Attorney General of the United States,* Civil No. 5208–48, District of Columbia, to show cause why a writ of prohibition and/or a writ of mandamus should not issue against them and each of them, in accordance with the prayer of said petition, and why the petitioners should not have such other and further relief therein as may be just.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

MAY 1949.

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In the Supreme Court of the United States

OCTOBER TERM 1948

No.

IN THE MATTER OF THE PETITION OF THE FEDERAL SECURITY ADMINISTRATOR AND THE ATTORNEY GENERAL FOR WRITS OF PROHIBITION AND/OR MANDAMUS

PETITIONS ON BEHALF OF THE FEDERAL SECURITY ADMINISTRATOR AND THE ATTORNEY GENERAL OF THE UNITED STATES FOR WRITS OF PROHIBITION AND/OR MANDAMUS

The Federal Security Administrator and the Attorney General of the United States, by Philip B. Perlman, Solicitor General of the United States, by leave of the Court first had and obtained, file this, their petition for a writ of prohibition and/or for a writ of mandamus against the Honorable Bennett Champ Clark, Associate Judge of the United States Court of Appeals for the District of Columbia Circuit, the Honorable Alan [illegible]. Goldsborough and the Honorable Edward A. Tamm, United States District Judges, who have been designated as a district court of three judges under 28 U. S. C. 2284 to hear and determine a case entitled *Mytinger & Casselberry, Inc.* v. *Oscar R. Ewing,*

et. al, No. 5208–48, District of Columbia and respectfully represent:

1. The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, 1044, Section 304 [21 U. S. C. 334] provides in pertinent part as follows:

> (a) Any article of * * * drug * * * that is * * * misbranded when introduced into or while in interstate commerce * * * shall be liable to be proceeded against * * * on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: *Provided, however,* That no libel for condemnation shall be instituted under this Act, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under this Act based upon the same alleged misbranding, and not more than one such proceeding shall be instituted if no such proceeding is so pending, except that such limitations shall not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this Act, or (2) when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be

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in a material respect misleading to the injury or damage of the purchaser or consumer. * * *

(b) The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury. When libel for condemnation proceedings under this section, involving the same claimant and the same issues of adulteration or misbranding, are pending in two or more jurisdictions, such pending proceedings, upon application of the claimant seasonably made to the court of one such jurisdiction, shall be consolidated for trial by order of such court, and tried in (1) any district selected by the claimant where one of such proceedings is pending; or (2) a district agreed upon by stipulation between the parties. If no order for consolidation is so made within a reasonable time, the claimant may apply to the court of one such jurisdiction, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, in which all such pending proceedings shall be consolidated for trial and tried. Such order of consolidation shall not apply

so as to require the removal of any case the date for trial of which has been fixed. The court granting such order shall give prompt notification thereof to the other courts having jurisdiction of the cases covered thereby.

2. Pursuant to this provision of law the Federal Security Administrator, the Commissioner, Associate Commissioner, and Assistant Commissioner of Food and Drugs determined that there is probable cause to believe from facts found, without hearing, by Robert C. Butz, Medical Officer, that the labeling of the drug "Nutrilite Food Supplement" to-wit, each of three revisions of a booklet entitled "How to Get Well and Stay Well", distributed by Mytinger & Casselberry, Inc., would be in a material respect misleading to the injury or damage of the purchaser or consumer.

3. The statutory determination having been regularly made, the Federal Security Agency defendants reported shipments of the drug to the several United States Attorneys with a request that a suit *in rem,* on libel of information, be brought seeking the condemnation of the misbranded drugs that had passed in interstate commerce.

4. These recommendations resulted in the institution of ten suits in the United States District Courts for the following districts.

New Jersey (2).
Southern District of New York.
Western District of New York.

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Nebraska.
Minnesota.
Eastern District of Washington.
Western District of Washington.
Northern District of Illinois.
Southern District of Florida.

5. In each action a specified lot of "Nutrilite Food Supplement" and its labeling has been seized by a United States Marshal, and a claim and answer has been filed. The claimant, Mytinger & Casselberry, Inc., moved in the District of New Jersey for consolidation of the cases for trial in the Southern or Northern District of California, as allowed under Section 304 (b), but this motion was removed from the calendar at claimant's request after the three-judge court entered a temporary injunction to restrain the further prosecution of the cases.

6. The drug, "Nutrilite Food Supplement", is an encapsulated concentrate of alfalfa, watercress, and parsley, fortified with synthetic vitamins, sold in connection with mineral tablets. The booklet, "How to Get Well and Stay Well", is a carefully conceived writing alleged in the several libel suits to represent that the drug is an effective curative and therapeutic agent which will prevent and cure the ills that commonly affect mankind, including such serious ones as tuberculosis, cancer, heart disease, glandular and nervous disorders, etc. One of its prime vices is that it suggests to the reader that if he has a chronic condition (which

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may well be diabetes or cancer) he should experiment with his health through the use of the drug before consulting a physician.

7. On December 30, 1948, Mytinger & Casselberry, Inc., filed suit in the United States District Court for the District of Columbia to enjoin the Federal Security Agency defendants and the Attorney General (1) from instituting more libel for condemnation suits, (2) from proceeding with the cases that were then pending (except for the first case filed), and (3) to require the defendants to dismiss all but one action and to consent to the removal of that action to the Southern District of California for trial.

8. The complaint alleged that the plaintiff had had several contacts with the local representatives of the Food and Drug Administration in Los Angeles, that as a result of the contacts it had completely revised its labeling to eliminate all claims that were in any wise false or fraudulent, but that nevertheless the firm was indicted for violation of the Federal Food, Drug, and Cosmetic Act in the Southern District of California. The complaint then alleged that, though the plaintiff had no knowledge of what administrative action might have been taken, any determination of probable cause that may have been made under Section 304 (a) was erroneous and made without hearing or proper factual basis, and that the multiple suits would injure the plaintiff's business.

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9. A hearing on the defendants' motion to dismiss and the plaintiff's motion for temporary injunction was held before District Judge Pine. Both motions were denied without prejudice on the ground that, since the initial determinations of probable cause had been made by the Food and Drug Administration defendants acting under delegated authority rather than by the Federal Security Administrator, the determinations were improper. On January 28 the Federal Security Administrator made determinations of probable cause, and the motion to dismiss was renewed. Judge Pine granted the motion, holding that the allegations of the complaint failed to state a claim on which relief could be granted.

10. Plaintiff obtained leave to amend to allege that the statutory provision quoted in paragraph 1 is unconstitutional because its provision authorizing the determination of probable cause without hearing deprived plaintiff of its property without due process of law.

11. An amended complaint was filed in substantially the same form as the original complaint. The only substantial changes were in paragraph 18, 24–26 where the constitutional question was presented. Judge Tamm granted a temporary restraining order on March 4 without taking evidence. Application was made for a three-judge statutory court, and the defendants' motion to dismiss was argued before Judges Clark, Goldsborough, and Tamm on April 6, 1949. At

that time counsel for both sides argued the constitutional question, on the assumption that Judge Pine's order of dismissal had become the law of the case on all other questions. Transcript of Argument on Defendant's Motion to Dismiss, April 6, 1949. The same day, the court on its own initiative informally directed counsel to stipulate that the restraining order would be continued in effect, to prepare for a pre-trial conference on April 15, and to prepare for a "trial on the merits as to whether the labeling is materially misleading." The defendants' counsel refused to stipulate, and the court thereupon denied the motion to dismiss and granted a temporary restraining order and a preliminary injunction. This injunction provides in part that the defendants and their privies are restrained and enjoined temporarily pending the final judgment herein from continuing the prosecution of any pending libel action, other than the first, and from instituting or causing to be instituted further libel actions. The injunction was issued without the findings of fact or conclusions of law required by Rule 52 (a) of the Rules of Civil Procedure and 28 U. S. C. 2284.

12. A pretrial conference was held on April 13 before Judge Tamm. Judge Tamm stated the issue to be tried was whether the labeling "is materially misleading" (Pretrial Tr., 4, 17, 28, 37). The issue was stated more specifically by Judge Tamm as follows:

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The issue before the Court fundamentally, insofar as the testimony is concerned, will be the question of misleading labeling in the use of the book How to Get Well and Stay Well [Pre-trial Tr. 18].

There are two questions before the Court, one, a question of fact as to whether the labeling is misleading, and two, the question of whether the action which the defendant in the case took violated the constitutional rights of the plaintiff [Pre-trial Tr. 37].

The defendants have requested, but not obtained a pre-trial order. The case is scheduled for trial on May 9, 1949.

13. Counsel for the defendants objected to the trial (1) because Judge Pine's ruling was the law of the case on everything but the constitutional issue; and (2) because the court was without jurisdiction to go into the question of misleading labeling in that the Federal Food, Drug, and Cosmetic Act vests exclusively in the Federal Security Administrator the function of determining "whether there is probable cause to believe that the labeling involved in this case is materially misleading to the injury or damage of the purchaser or consumer", as a preliminary to the institution of multiple libel actions (Pre-trial Tr. 6–7). Counsel also requested the court to vacate its temporary restraining order and preliminary injunction of April 6 for the reason that findings

of fact and conclusions of law had not been issued. (Pre-trial Tr. 7–8.)

14. The defendants' objections to the trial having been overruled, on April 14 counsel for the plaintiff served notices to take the depositions of Federal Security Administrator Ewing, Assistant Federal Security Administrator Kingsley, Commissioner of Food and Drugs Dunbar, Assistant Commissioner Larrick, and three subordinate officials of the Food and Drug Administration in the Los Angeles area. The notices were followed by the service of subpoenas duces tecum which required the production of all records of the Agency relating to Mytinger & Casselberry, Inc., Lee S. Mytinger, William S. Casselberry, Nitrilite Products, Inc., Carl F. Rehnborg, and "Nutrilite Food Supplement". The defendants moved to quash the subpoenas (1) on the ground that it was not the judicial function to probe the mental processes of the Administrator in reaching his decision, and (2) because the subpoena was too broad, vague, oppressive and unreasonable, because it did not designate any papers, because the records were protected from disclosure by 21 C. F. R. 196.1, and because Rule 34 of the Rules of Civil Procedure for the United States District Courts had not been complied with. A hearing was held before Judge Bennett Champ Clark, at which time he overruled the defendant's objections (Tr. 2, 4, 21).

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15. The provisions of the Federal Food, Drug, and Cosmetic Act, quoted in paragraph 1, authorize the Federal Security Administrator to make the preliminary determination of probable cause to support multiple seizure actions. This determination may be made on the basis of facts found without hearing. It is not reviewable because it is preliminary in nature, it involves the exercise of administrative discretion, and the statute precludes review. The court below has no jurisdiction to review the Administrator's preliminary finding of probable cause. And the court certainly had no jurisdiction to try *de novo* the issue which the statute left to the Administrator to determine.

16. Under the statutory scheme, jurisdiction to determine whether an article was misbranded was vested in the district courts in which actions for libel are filed. The court below had no jurisdiction to compel the Government to try before it the question whether plaintiff's labeling was misleading, or to enjoin proceedings in the district courts in which the actions for libel had been instituted.

17. Plaintiff's contention that the provision in Section 304 (a) permitting multiple libel actions to be instituted when the Administrator has made a finding of probable cause is unconstitutional, because it permits the Administrator to make his findings without a hearing, is wholly insubstantial, inasmuch as the finding is merely a prerequisite to the institution of judicial proceedings in which a full hearing will necessarily be held.

18. If, pursuant to the directive of the three-judge district court, a trial is held, there will be an unauthorized intrusion upon the administration and enforcement of an important public law. Pending final judgment herein, the enforcement of the Act is stayed to the detriment of the public, during which time Mytinger & Casselberry, Inc., have judicial sanction for the continuance of a business of $500,000 per month which the administrative agency, as is its right, has determined involves materially misleading labeling which injures or damages the purchasing public. Correction of this error by appeal will not adequately protect the public, because the continued distribution of the drug accompanied by misleading labeling does irreparable injury to the public health in encouraging purchasers to experiment with their lives and irreparable injury to the buyer's pocketbook. The preliminary injunction and the necessity for trial on an issue over which the court has no jurisdiction take from the public the benefit of the protection intended by Congress in the Federal Food, Drug, and Cosmetic Act. The preliminary injunction also interferes with the lawful exercise of jurisdiction by the nine district courts in which the suits *in rem,* on libel of information for condemnation, have been instituted.

Wherefore, the said Federal Security Administrator and the Attorney General of the United States, the aid of this Honorable Court requesting, pray:

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1. That a writ of prohibition be issued out of this Court to prevent the judges of the three-judge court from exercising any jurisdiction to try the issue whether the labeling of the drug "Nutrilite Food Supplement" is misleading.

2. That a writ of mandamus issue out of this Court directing the three-judge district court, in the action entitled *Mytinger & Casselberry, Inc.*, v. *Ewing, et al.*, No. 5208–48, District of Columbia, to vacate the temporary injunction, and to proceed to determine solely whether Section 304 (a) of the Federal Food, Drug, and Cosmetic Act is invalid because in contravention of the Due Process Clause of the Fifth Amendment, or, in the alternative, if this Court believes that there is no substantial question of constitutionality, to dismiss the action.

3. That pending the decision of this Court herein the three judges be restrained from proceeding further in the case of *Mytinger & Casselberry, Inc.*, v. *Ewing, et al.*, No. 5208–48, District of Columbia, except for determining the constitutional issue.

4. That this Court grant the Federal Security Administrator and the Attorney General of the United States such other and further relief as may be just in the premises.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

REASONS FOR GRANTING THE WRITS

I

THE DISTRICT COURT LACKED JURISDICTION TO DETERMINE WHETHER PLAINTIFF'S LABELING WAS MISLEADING

A. *The Statutory Scheme.*—Section 304 (a) of the Federal Food, Drug and Cosmetic Act, 52 Stat. 1044, 21 U. S. C. 334 (a) (quoted *supra*, pp. 4–5) provides that drugs which are adulterated or misbranded when introduced into or while in interstate commerce or held for sale thereafter may be proceeded against in any United States district court within the jurisdiction of which the article is found on libel of information, and ordered condemned. The section makes specific provision for circumstances under which more than one libel action may be instituted for the same misbranding. Such actions (which we shall characterize herein as multiple libels) may be brought only (1) when there has been a prior judgment in favor of the United States, or (2) "when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer."

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Paragraph (b) of Section 304 (*supra*, p. 5) contains special provisions to prevent the owner of the libeled product from having to try libel actions in different parts of the country. Where libels involving the same claimant and issues of misbranding are pending in two or more districts, they are to be consolidated for trial in "(1) any district selected by [the claimant] where one of such proceedings is pending; or (2) a district agreed upon by stipulation between the parties"; or (3) in a district of reasonable proximity to the claimant's principal place of business, if so ordered by the court.

These provisions with respect to multiple libels were enacted by Congress after careful consideration. Under the Federal Food and Drugs Act of 1906, 34 Stat. 771, goods that were adulterated or misbranded were subject to seizure wherever found, and multiple seizures regularly were made. The Act of 1906 was revised comprehensively in 1938. Bills originally proposed provided for executive seizures of articles "dangerous to health" (S. 2000 and S. 2800, 73rd Cong., 2d Sess.)[1] and placed no limitation on the number of libel actions. This was subsequently redrafted so as to allow the United States district courts to restrain unlawful seizures in specified cases. See S. 2800, Section 19 (c), printed in *Dunn*, p. 105. The Sen-

[1] These bills appear in Dunn, *Federal Food, Drug, and Cosmetic Act* (1938): S. 2000, Sec. 16 (a), p. 61; S. 2800, Sec. 16 (a), p. 81; and S. 2800, as amended, Sec. 16 (a), p. 102.

ate at one time accepted an amendment prohibiting multiple seizures except upon order to show cause. S. Rep. 361, 74th Cong., 1st Sess., Part 2, p. 11, *Dunn*, pp. 263, 389, 399, 468–469. A later draft of the bill eliminated the provision for executive seizures, and authorized multiple actions for libel in case of misbranding when the Secretary had probable cause to believe from facts found by him that the article was so misbranded as to render it imminently dangerous to health or when the alleged misbranding had been the subject of a prior judgment. *Dunn*, pp. 505–506.

Three further changes were made, all pertinent here. A provision was added authorizing multiple seizure in cases where the Secretary had probable cause to believe that the misbranding was in a material respect false, misleading or fraudulent. *Dunn*, pp. 546, 558. The committee also eliminated the provision of the Senate bill which gave the district courts jurisdiction to restrain a multiplicity of seizure actions. *Dunn*, pp. 429, 558.[2]

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[2] The House Committee Report (H. Rept. 2755, 74th Cong., 2d Sess., *Dunn*, pp. 550, 558) stated:

"There are two substantive changes made by this committee. One is that multiple seizures would be permitted in cases where the Secretary has probable cause to believe that the misbranding is in a material respect false, misleading, or fraudulent. This will permit protection of the public against such nostrums as a brew of weeds labeled as a treatment for diabetes and against innumerable other cheats and frauds which at best rob the consumer's pocketbook, and at worst rob him of health or life through his mistaken reliance upon them while his disease progresses unchecked. With this

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And finally the conference committee inserted the words "without hearing" in the provision requiring the Administrator to make a finding as to probable cause. *Dunn*, pp. 974, 992–3.

In short, Congress has established a procedure for the protection of the consumer against misleading as well as dangerous labeling through multiple actions for libel to be instituted upon an administrative finding of probable cause. The claimant is protected against harassment by his right to consolidate the cases for trial in any of the districts he may select. And, as the history of the statute shows, other courts were not to have power to review these proceedings, and the Administrator was not required to hold a hearing in advance of the libel actions.

Whether a product was misbranded would, of course, be the issue before the district court in a libel proceeding. The preliminary finding of probable cause merely empowers the Administrator to request the Department of Justice to institute more than one proceeding against the same product. The fact that the finding was to be made "without hearing" demonstrates clearly that Congress understood that the trial on the merits was to take place before the district court in the action for libel.

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change the seizure section will continue to function as a means of 'arresting the bullet in flight before it claims its victim,' although the administrative agency will have materially less latitude, in making multiple seizures, than it had under the present law for the past 30 years."

B. *The District Court has no jurisdiction.*—The amended complaint in the instant case prays that the defendant Government officials be enjoined from proceeding in or instituting any libel actions (except the first) against plaintiff's product, on the ground that the statutory provision for multiple libels violates the due process clause and because the Administrator's decision as to probable cause was illegal and void. The District Court has ordered a trial on the "question of fact as to whether the label is misleading", and on the issue whether the action of the defendants violated the constitutional rights of the plaintiff. (Pretrial Tr. 37.)

This order has the effect of transferring the trial of the merits of the libel actions from one of the district courts in which the actions for libel are pending—the claimant to have his choice—to the District Court for the District of Columbia, and to impose on the Administrator the necessity of trying the merits of the controversy in support of his preliminary finding of probable cause.

The Act provides for a preliminary finding by the Administrator of probable cause to believe that the labeling "would be in a material respect misleading", and for the trial of the substantive issue as to whether the product is misbranded in one of the courts in which libel proceedings have been instituted (or where stipulated or specifically ordered, see pp. 4, 5, *supra*). No provision is made for trying *de novo* in court the preliminary matter

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which the statute left to the Administrator. And clearly it was not contemplated that the identical question to come before the libel court—differing at most only in the quantum and placement of the burden of proof—may be tried in advance by any other court in an injunction proceeding. Trial of the merits of the case in an injunction suit, while a temporary injunction against prosecution of the libel actions is extant, as here, prevents the Administrator from making effective use of the carefully devised statutory procedure for keeping products which there is probable cause to believe are seriously misbranded from reaching the public during the pendency of the case.

This frustration of the statutory scheme will have consequences beyond this case. Whether the Government officials are successful or unsuccessful in proving that the plaintiff's labeling is misleading, the effect of the ruling below as to the issue to be tried, while it stands unreversed, will be to permit all persons against whom multiple libels are instituted to seek the same relief in the court of the District of Columbia. Adherence to the procedure set forth in the statute does not mean that a claimant such as plaintiff here will be denied a quick decision on the merits of this case. He has his choice of districts, and there is no reason why the libel cannot be tried as promptly as an injunction suit in the District of Columbia. Here, the first libel against the plaintiff's property was filed on September 30, 1948. There is no

reason to believe that the misleading character of plaintiff's labeling could not have been determined by one of the district courts by this time if plaintiff had not undertaken to bring the present case.

That the district court lacked jurisdiction to substitute itself for the Administrator by trying *de novo* the issue of misleading labeling or to review the Administrator's preliminary determination of probable cause appears not only from the general statutory plan, which vests in the libel courts sole authority to hear the merits of the cases, but from other factors as well. Several sections of the Federal Food, Drug and Cosmetic Act authorize judicial review of administrative action. Sections 505 (h), 701 (f), 21 U. S. C. 355 (h) and 371 (f). The absence of any such provision with respect to the preliminary finding of probable cause manifests a legislative intent that there be no review of such a finding, much more clearly than in the statute before the Court in *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297. Furthermore, the finding as to probable cause is obviously preliminary in nature. All it does is to permit the institution of law suits, in which the controversial issues may be submitted to a court. Preliminary orders are not reviewable in an injunction suit when they culminate in further administrative action. *Rochester Telephone Corp.* v. *United States,* 307 U. S.

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125, 130–131, and cases cited. When the preliminary administrative finding merely has the effect of authorizing the filing of lawsuits, the absence of jurisdiction in any other tribunal to review the administrative actions should be even clearer.

Under Section 304, the administrative finding of probable cause is to be made without hearing, undoubtedly because a hearing would follow immediately in the libel proceeding. But the court below intends to hold a hearing *de novo* on the "merits" of the case in order to determine whether the Administrator should have made the preliminary finding. Cf. *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 185. We submit that this is plainly not within the authority of the district court.

II

PROHIBITION AND MANDAMUS ARE PROPER REMEDIES IN THIS CASE

The writs of prohibition and mandamus "afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when it is its duty to do so." *Ex parte Peru*, 318 U. S. 578, 583; *United States Alkali Association* v. *United States*, 325 U. S. 196, 202. These writs may be granted by the Court in aid of its appellate jurisdiction. *Ibid.* Since the district court in the instant case is composed of

three judges, this Court is clearly an appropriate forum for the issuance of any writ.[3]

[3] It is established that this Court has full power in its discretion to issue the writ directly to the district court, when the nature and importance of the case warrants, even though direct appeal lies to a court of appeals. *Ex parte Peru*, 318 U. S. 578, 584–585. Normally, appeals from three-judge district courts come directly to this Court. 28 U. S. C. 1253, 2101, 2282. But where there are other issues in the case and the constitutional question is insubstantial, the three-judge court may be without jurisdiction, and appeal to the Court of Appeals might be the proper remedy. *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171. In the present case, the insubstantial character of plaintiff's argument that the statute is unconstitutional raises a question as to whether appeal ultimately will be held to lie to this Court or the Court of Appeals.

The constitutional question here is whether the due process clause precludes the bringing of more than one lawsuit against different shipments, into different districts, of an allegedly mislabeled product without requiring a prior *administrative* hearing. Inasmuch as a full judicial hearing is held in the libel action itself before any final judgment is entered, the contention is frivolous.

The fact that the articles in question may be detained until the termination of the litigation does not make the procedure unconstitutional. The procedure for seizure in advance of the hearing in a libel action has the same effect as a temporary injunction granted to the Government to prevent distribution to the public of a product claimed to be deceptively labeled. Certainly the latter could hardly be thought to be unconstitutional. Congress possesses the same power to protect the public rather than the private interest *pendente lite* when fraudulent labeling of food and drugs is involved. "The legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process or a usurpation of judicial functions." *Yakus* v. *United States*, 321 U. S. 414, 442, 439–443. See also, *Phillips* v. *Commissioner*, 283 U. S. 589, 595; *Lawton* v. *Steele*, 152 U. S. 133.

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We recognize that although the Court has power to issue the writs to compel district courts to act within their jurisdiction, it does so only in exceptional situations, and that the writs are not to be used as a substitute for the normal processes of appeal. *Ex parte Peru,* 318 U. S. 578, 583; *United States Alkali Association* v. *United States,* 325 U. S. 196, 202.

In recent years this Court has seen fit to exercise its discretion in favor of granting the writs in cases in which an important legislative or executive policy would otherwise be thwarted. *In the Matter of National Labor Relations Board,* 304 U. S. 486, prohibition and mandamus were held appropriate remedies to prevent a Court of Appeals from holding a hearing to review an order of the Labor Board which that Board lawfully wished to withdraw and set aside. This Court held that the Board and not the Court of Appeals had jurisdiction of the proceeding, and that the ordinary remedy of review by certiorari was inadequate. In *United States Alkali Association* v. *United States,* 325 U. S. 196, the Court held that the asserted conflict between the jurisdiction of the district court and of the Federal Trade Commission was sufficient basis for determination of the jurisdictional question by this Court on petition for an extraordinary writ, inasmuch as otherwise the asserted intention of Congress to confer preliminary jurisdiction upon the Commission would be defeated. In *Ex parte Peru,* 318 U. S. 578, the writ was granted to determine a question of sovereign immunity, since

it was regarded as important promptly to decide whether the matter was to be handled by the Department of State through diplomatic negotiations or by the courts—although the point could have been presented and decided in the ordinary course of appeal.

As in the *Labor Board* case and as asserted in the *Alkali* case, the court below is exercising jurisdiction over a matter committed to an administrative official—the preliminary finding of probable cause—in a manner which prevents the use of the statutory procedure devised by Congress to protect both the public and the claimant. The court below has ordered a full hearing on the "merits" of the case at this stage, although Congress deliberately provided that the Administrator's determination as to probable cause to file multiple libels shall be without hearing. The court also has undertaken to try the very issue which Congress left for determination by the district courts in the actions for libels, and has enjoined further proceeding in the district courts in which the libels have been filed. The special exception allowed for the first libel action is inconsistent with the statutory provision for the consolidation of the libels in a single district in a manner specified in detail in the statute.

In an ancillary ruling the court below, in direct contravention of the holding of this Court in *Morgan* v. *United States,* 304 U. S. 1, 18, and *United States* v. *Morgan,* 313 U. S. 409, 422, is

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requiring administrative officials to answer questions as to their mental processes in reaching the preliminary finding. The district court, through Judge Clark, denied the Government's motion, in which that question was raised, to quash a subpoena to take the testimony of the administrative officials. See p. 12, *supra*. This may tend to indicate the scope of the hearing which the court below intends to hold.

The procedure followed by the court below is not only clearly contrary to the congressional policy embodied in the statute, but is contrary to the public interest which that policy was designed to protect—the safeguarding of the public health and purse against deception. For Congress provided for seizure of articles prior to trial upon a finding of probable cause by the Administrator, who must be presumed to be acting in good faith. The harm to the public from widespread distribution of mislabeled articles was deemed to outweigh the harm to the purveyor of the articles from temporary interruption to his business. By asserting authority to decide the misleading character of the labeling in an injunction suit, in which all libel proceedings but one are enjoined, the court has undertaken to require the Administrator to prove his case in advance of the seizures which alone keep the product from reaching the public.

We submit that the normal course of appeal would not constitute an adequate remedy here

to any greater extent than in the *Labor Board, Alkali* and *Peru* cases. Although an appeal probably would be taken to this Court from any decision of the court below, there is a possibility that this Court might hold the Court of Appeals the proper appellate tribunal on the ground that the constitutional question is insubstantial. See p. 24, note 3, *supra.* If that occurred, the case would run its normal course in the Court of Appeals, and then in all likelihood return to this Court on petition for a writ of certiorari. Unless the temporary injunction now in effect were vacated or plaintiff denied additional temporary relief, the effectiveness of the procedure established by Congress for protecting the public throughout the country by bringing a number of libel actions will be seriously impaired during the entire pendency of the proceeding, not only in this case but more generally so long as the precedent established by the court below remains unreversed.

The sanction of multiple actions is essential to arrest the distribution of a dangerous product, a fraudulent product, or a materially misleading product before it has claimed its victims and before irreparable injury is done. Without the sanction, there is no way in which dangerous, fraudulent, or seriously misleading drugs may be removed from the market and held within the custody of law pending a determination of the alleged misbranding. Under the precedent that

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is in the making by the three-judge court, a distributor of a dangerous or a fraudulent drug would have the right to challenge the Government's allegation in an injunction suit in the District of Columbia and stay the arm of enforcement for months while the "probable cause" issue was in litigation. It was precisely to avoid the evils of such delay that the Administrator was authorized to make the determination of probable cause without hearing. If the court has the right to try the issue *de novo,* the beneficial effects of the expeditious procedure prescribed for administrative action are nullified; and great public harm can be done before the administrative officials may report the shipments of contraband for the institution of appropriate action.

More is involved here than the rights of the parties litigant. The public has an important stake in the outcome of the litigation and would be irreparably injured by delay. No means exist to protect the consumer from the consequences of protracted appeals. The injury to the public is direct in terms of money expended for a materially misbranded drug and in terms of health hazards inherent in experimenting with the drug in the treatment of what may well be serious disorders which require prompt, competent medical attention.

This injury to the public interest, though different in kind, is, we submit, greater than that

held to be sufficient basis for the granting of an extraordinary writ in the *Peru* and *Alkali* cases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should issue a writ of prohibition directing the district court to proceed no further with the trial of the question of misleading labeling, and a writ of mandamus ordering the district court to vacate the temporary injunction, and to proceed to determine solely whether Section 304 (a) of the Federal Food, Drug, and Cosmetic Act is invalid because in contravention of the due process clause of the Fifth Amendment, or, in the alternative, if this Court believes that there is no substantial question of constitutionality, to dismiss the action.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

MAY 1949.

U. S. GOVERNMENT PRINTING OFFICE: 1949

LIST OF DOCUMENTS FILED WITH THE CLERK

(Documents preceded by asterisks are printed in this appendix)

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2.	Motion To Dismiss and for Summary Judgment January 17, 1949.	
3.	Affidavits in Opposition to Motion for Temporary Injunction.	
4.	Determinations of Probable Cause by Food and Drug Administration Officials. Crawford—September 30, 1948. Larrick—December 2, 1948. Dunbar—December 9, 1948.	
5.	Order Denying Motion To Dismiss Without Prejudice. January 25, 1949.	
*6.	Determination of Probable Cause by Federal Security Administrator..... Kingsley—January 28, 1949. Kingsley—January 28, 1949. Kingsley—January 28, 1949. Pamphlet—How To Get Well and Stay Well.	1
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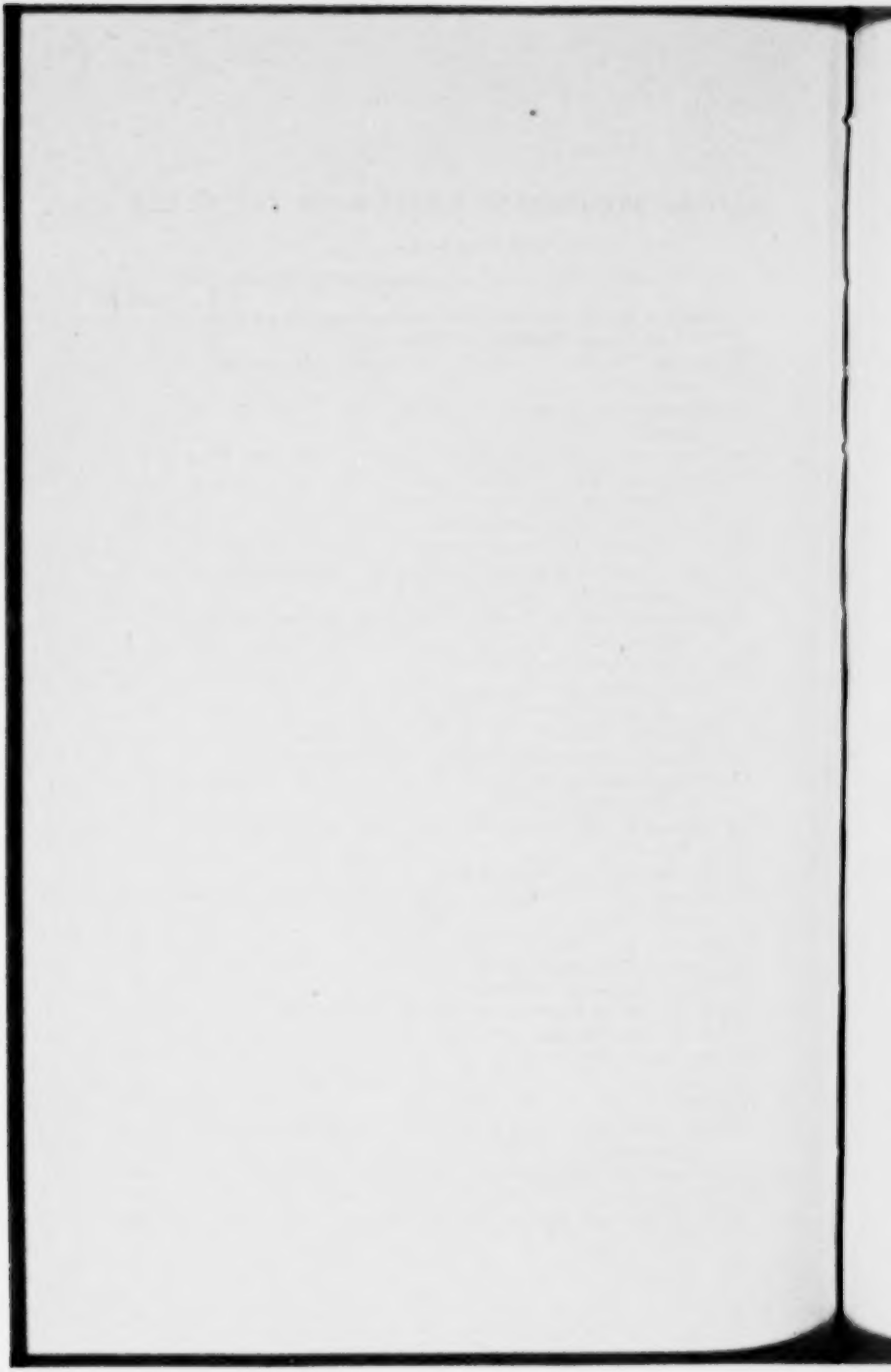

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FEDERAL SECURITY AGENCY
FOOD AND DRUG ADMINISTRATION
WASHINGTON 25, D. C.

9–113 K

Nutrilite Food Supplement

Finding of Fact

It is the consensus of informed medical opinion that a product consisting of extracts of alfalfa, parsely, and water cress fortified with crystalline vitamins and vitamin concentrates which provides in the daily intake the following:

Vitamin A	25,000 U. S. P. units.
Vitamin B_1	20 milligrams.
Vitamin B_2	10 milligrams.
Vitamin C	200 milligrams.
Vitamin D	2,500 U. S. P. units.
Vitamin E	10 milligrams.
Vitamin K	0.4 milligram.
Vitamin B_6	4 milligrams.
Inositol	20 milligrams.
Para-aminobenzoic acid	20 milligrams.

together with a product consisting of bone meal, dicalcium phosphate, iron ammonium citrate, potassium iodide, niacin amide, and pantothenic acid which provides in the suggested daily intake the following:

Calcium	960 milligrams.
Phosphorus	562 milligrams.
Iron	10 milligrams.
Iodine	0.4 milligram.
Niacin amide	15 milligrams.
Pantothenic acid	8 milligrams.

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would not be effective in the treatment of low vitality, overfatigue, insomnia, poor appetite, gastro-intestinal distress, recurrent vague aches and pains, weak eyes, defective teeth, nervousness, heart disease, stomach pains, disease conditions requiring surgery, feeble mindedness, diabetes, hemorrhage connected with the menopause, indigestion, sneezing, weeping, anemia, leukemia, sinus trouble, constipation, tuberculosis, headache, dizziness, vomiting, and all deficiency diseases.

(s) Robert C. Butz,
ROBERT C. BUTZ,
Medical Officer,
Food and Drug Administration.

SEPTEMBER 30, 1948.

Conclusion

Pursuant to the provisions of the Federal Food, Drug and Cosmetic Act and regulations promulgated thereunder, I conclude on the basis of the facts reported above by Dr. Robert C. Butz, an employee of the Food and Drug Administration of the Federal Security Agency, that there is probable cause for me to believe and I do believe, that the labeling of this article would be and is in a material respect misleading to the injury or damage of the purchaser or consumer.

(S) J. DONALD KINGSLEY,
Acting Administrator.

For the Administrator, January 28, 1949.

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FEDERAL SECURITY AGENCY
FOOD AND DRUG ADMINISTRATION
WASHINGTON 25, D. C.

5-610 K
Nutrilite Food Supplement

Finding of Fact

It is the consensus of informed medical opinion that a product consisting of extracts of alfalfa, parsley, and water cress fortified with crystalline vitamins and vitamin concentrates which provides in the suggested daily intake the following:

Vitamin A	25,000 U. S. P. units.
Vitamin B_1	20 milligrams.
Vitamin B_2	10 milligrams.
Vitamin C	200 milligrams.
Vitamin D	2,500 U. S. P. units.
Vitamin B_6	4 milligrams.
Vitamin E	10 milligrams.
Vitamin K	0.4 milligram.
Inositol	20 milligrams.
Para-aminobenzoic acid	20 milligrams.

together with a product consisting of bone meal, dicalcium phosphate, iron ammonium citrate, potassium iodide, niacin amide, and pantothenic acid which provides in the suggested daily intake the following:

Calcium	950 milligrams.
Phosphorus	562 milligrams.
Iron	10 milligrams.
Iodine	0.4 milligram.
Niacin amide	15 milligrams.
Pantothenic acid	8 milligrams.

would not be effective in the treatment of the conditions mentioned directly or by implication in the statements quoted in Exhibit "A" attached.

(s) Robert C. Butz,
ROBERT C. BUTZ, M. D.,
Medical Officer,
Food and Drug Administration.

DECEMBER 2, 1948.

Conclusion

Pursuant to the provisions of the Federal Food, Drug and Cosmetic Act and regulations promulgated thereunder, I conclude on the basis of the facts reported above by Dr. Robert C. Butz, an employee of the Food and Drug Administration of the Federal Security Agency, that there is probable cause for me to believe, and I do believe, that the labeling of this article would be and is in a material respect misleading to the injury or damage of the purchaser or consumer.

(s) J. DONALD KINGSLEY,
Acting Administrator.

For the Administrator, January 28, 1949.

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FEDERAL SECURITY AGENCY
FOOD AND DRUG ADMINISTRATION
WASHINGTON 25, D. C.

Nutrilite Food Supplement

Finding of Fact

It is the consensus of informed medical opinion that most common diseases do not result from dietary deficiencies and that a product consisting of alfalfa, parsley, and water cress fortified with crystalline vitamins and vitamin concentrates which provides in the suggested daily intake the following:

Vitamin A	25,000 U. S. P. units.
Vitamin B_1	20 milligrams.
Vitamin B_2	10 milligrams.
Vitamin C	200 milligrams.
Vitamin D	2,500 U. S. P. units.
Vitamin B_6	4 milligrams.
Vitamin E	10 milligrams.
Vitamin K	0.4 milligram.
Inositol	20 milligrams.
Para-aminobenzoic acid	20 milligrams.

together with a product consisting of bone meal, dicalcium phosphate, iron ammonium citrate, potassium iodide, niacin amide, and pantothenic acid, which provides in the suggested daily intake the following:

Calcium	950 milligrams.
Phosphorus	562 milligrams.
Iron	10 milligrams.
Iodine	0.4 milligram.
Niacin amide	15 milligrams.
Pantothenic acid	8 milligrams.

would not be effective in preventing or treating most common diseases.

(s) Robert C. Butz,
ROBERT C. BUTZ, M. D.,
Medical Officer,
Food and Drug Administration.

DECEMBER 9, 1948.

Conclusion

Pursuant to the provisions of the Federal Food, Drug and Cosmetic Act and regulations promulgated thereunder, I conclude on the basis of the facts reported above by Dr. Robert C. Butz, an employee of the Food and Drug Administration of the Federal Security Agency, that there is probable cause for me to believe, and I do believe, that the labeling of this article would be and is in a material respect misleading to the injury or damage of the purchaser or consumer.

(s) J. DONALD KINGSLEY,
Acting Administrator.

For the Administrator, January 28, 1949.

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In the United States District Court for the District of Columbia

Civil Action No. 5208–48

MYTINGER AND CASSELBERRY, INC., A CALIFORNIA CORPORATION, 1724 SANTA FE AVENUE, LONG BEACH, CALIFORNIA, PLAINTIFF

v.

OSCAR R. EWING, ADMINISTRATOR, FEDERAL SECURITY AGENCY; PAUL B. DUNBAR, COMMISSIONER, FOOD AND DRUG ADMINISTRATION; CHARLES W. CRAWFORD, ASSOCIATE COMMISSIONER, FOOD AND DRUG ADMINISTRATION; LOUIS D. ELLIOTT, ASSISTANT COMMISSIONER, FOOD AND DRUG ADMINISTRATION; GEORGE P. LARRICK, ASSISTANT COMMISSIONER, FOOD AND DRUG ADMINISTRATION; AND TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES, WASHINGTON, D. C., DEFENDANTS

AMENDED COMPLAINT FOR TEMPORARY AND PERMANENT INJUNCTION AND TEMPORARY RESTRAINING ORDER

1. Plaintiff is a California corporation, having its principal place of business in the City of Long Beach, California, which is located in the jurisdiction of the United States District Court for the Southern District of California, Central Division. Defendant Oscar R. Ewing is the Administrator of the Federal Security Agency; Defendants Paul B. Dunbar, Charles W. Crawford, Louis D. Elliott, and George P. Larrick are the Commissioner, Associate Commissioner, and Assistant Commissioners, respectively, of the Food and Drug Administration of the Federal Security Agency; and

Defendant Tom C. Clark is the Attorney General of the United States; all of the said defendants being officers or agents of the United States Government empowered by the Congress of the United States and by the Federal Security Agency with the due and proper administration of the Federal Food, Drug and Cosmetic Act of 1938, as amended, and having their principal places of business in the District of Columbia.

2. This action arises under the provisions of the Federal Food, Drug and Cosmetic Act of 1938 (Title 21, U. S. C. Sections 301–392), the Administration Procedure Act (Title 5, U. S. C. Sections 1001–1011), and the Constitution of the United States, as hereinafter more fully appears.

3. Plaintiff is and has been since September 1945, the exclusive national distributor for a vitamin and mineral food product known as "Nutrilite Food Supplement" which consists of capsules containing a base of a concentrate of alfalfa, parsley, and watercress, fortified with added vitamins, and tablets containing several food minerals. Sales of Nutrilite Food Supplement are made through Plaintiff's distributors direct to consumers and in connection with said sales a booklet prepared by Plaintiff under the title "How to Get Well and Stay Well" is used. Said booklet contains a general discussion of nutrition, the need for vitamins and minerals in nutrition, and the deficiency conditions which can

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result from a lack of such factors in the diet. The Plaintiff has also made statements and representations concerning the said Nutralite Food Supplement in labels upon the bottles containing the same, upon the cartons in which the said bottles are enclosed and in said booklet, "How to Get Well and Stay Well." The statements contained in and upon the said labels, cartons and booklet have been prepared with care, under scientific and legal direction, and in the utmost of good faith; no representations have been made thereunder which the Plaintiff and its officers and agents did not believe, and have reason to believe, were and are true; and nothing contained therein has been or is false, fraudulent, or in any respect misleading to the injury or damage of any purchaser or consumer.

4. The product "Nutrilite Food Supplement" contains no substance or material or combination of substances or materials harmful or deleterious in any manner whatsoever to human users thereof and in fact does contain substances and materials which have been demonstrated by scientific tests and by actual experience of users to be helpful to the health of human beings. No claim has at any time been made by any Federal, State, or other governmental agency that Nutrilite Food Supplement is adulterated or harmful in any manner whatsoever to the health of human users thereof.

5. Plaintiff distributes Nutrilite Food Supplement in interstate commerce through the United States and, through energetic and resourceful techniques, has developed and expanded its distribution business to a point where it has representatives in each of the forty-eight States of the United States and has, through sound and honest business practices, built up a lucrative trade amounting to more than $500,000 a month prior to the filing of the seizure actions hereinafter referred to. Plaintiff further alleges that a very large percentage of its present total volume consists of sales to unsolicited persons to whom Nutrilite Food Supplement has been recommended by users thereof and by other persons not connected directly or indirectly with Plaintiff or its organization. The very nature of Plaintiff's business makes good will its most valuable asset, and Plaintiff states that the good will built up for its products by honest and conscientious effort since their product was first marketed in 1933 makes possible its present success.

6. In the latter part of the year 1946, representatives of the Food and Drug Administration of the Federal Security Agency visited the offices of Plaintiff in the City of Los Angeles, California, and were furnished, at their request, copies of all literature then used by Plaintiff in connection with the sale of said product, including the then current edition of the booklet entitled "How to Get Well and Stay Well," and,

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in addition thereto, requested and were furnished with names and addresses of certain of Plaintiff's distributors of said product in States other than the State of California.

7. In January 1947, an Inspector of said Food and Drug Administration visited the offices of Plaintiff at Long Beach, California, and requested and received the names and addresses of additional distributors of Nutrilite Food Supplement, and, in particular, distributors to whom shipments of said product had just recently been made and who would therefore most probably have said product on hand at said time and for a number of days thereafter. On the occasion of said visit by said representative of the Food and Drug Administration, additional copies of the booklet "How to Get Well and Stay Well" were voluntarily offered by Plaintiff and without solicitation or request therefor from said representative and at said time Plaintiff requested said representative to advise it if the Food and Drug Administration had any objections to said booklet or the contents thereof. Plaintiff was then and there informed by said representative that, so far as he knew, there were no objections thereto and that copies, additional to those previously furnished as alleged in Paragraph 6 hereof, were not needed.

8. In June 1947, said Food and Drug Administration in Los Angeles, California, addressed a notice to Plaintiff, acting under the provisions of

Title 21, Section 335, United States Code, and a hearing pursuant thereto was held in the offices of said Food and Drug Administration in Los Angeles, California, in July 1947. At said hearing it was alleged by representatives of said Food and Drug Administration generally that said booklet "How to Get Well and Stay Well" and certain other literature contained objectionable material which, however, were not specified. Notwithstanding the fact that representatives of said Food and Drug Administration made no specification of any purportedly objectionable matter in said booklet and the other literature, the legal representative of Plaintiff at said hearing advised the representatives of said Food and Drug Administration that the objectionable literature would be immediately discontinued and that said booklet would be revised in its entirety and revised so as to eliminate any possible objection that might be made by the Food and Drug Administration, and Plaintiff alleges that said Plaintiff did immediately discontinue the use of such literature and took immediate steps toward the revision of said booklet and it was in fact thereafter republished in the revised form in conformance with the views of the Food and Drug Administration as the same were explained to Plaintiff and its attorney. Instructions were subsequently issued to all of Plaintiff's distributors to destroy the old booklets. At said hearing it was also alleged by representatives of said Food and Drug

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Administration that one of Plaintiff's products known as "B & E" Nutrilite Food Supplement contained a 40% shortage of Vitamin B_1. Thereupon, Plaintiff obtained from the Food and Drug Administration a portion of the specific sample so alleged to be deficient and secured an analysis thereof from a reputable independent laboratory which determined that said deficiency was no more than 5% and could be attributable to the length of time elapsing between the shipment of the tested product and the analysis thereof. Plaintiff alleges in this connection that Vitamin B_1 is a product the potency of which diminishes with the lapse of time. No further charges or hearings with respect to said alleged deficiency of Vitamin B_1 have been made or had to date hereof. At said hearing, representatives of said Food and Drug Administration also stated that the labels used by Plaintiff on said product did not fully comply in certain particulars with the Federal Food, Drug and Cosmetic Act. Thereupon, Plaintiff immediately revised said labels to meet said objections and said labels have at all times since complied and do now comply with said Act.

9. Following the hearing of July 1947 referred to in Paragraph 8 hereof, Plaintiff learned that agents of said Food and Drug Administration were interrogating many of Plaintiff's subdistributors and customers. In order to determine the basis for such interrogations, Plaintiff arranged a meeting with representatives of said

Food and Drug Administration in the offices of the latter in Los Angeles, California. At said meeting, the Chief of the Los Angeles station of said Food and Drug Administration was informed by Plaintiff that Plaintiff desired to comply in every respect with every phase of the Federal Food, Drug and Cosmetic Act, and requested said Chief to advise Plaintiff if said investigation and interrogations were prompted by a belief in the minds of representatives of said Administration that any phase of Plaintiff's labels or labeling in any manner or at all violated any provision of law. In reply thereto, said Chief advised Plaintiff that said investigation and interrogations were merely "routine" in nature, and no statement was made by said Chief that any phase of Plaintiff's labels or labeling was suspected of being in violation of the Federal Food, Drug and Cosmetic Act.

Plaintiff alleges that the term "misbranding" is undefined in any provision of the Federal Food, Drug and Cosmetic Act except in general terms as contained in Sections 201 (n), 403 and 502 of said Act. (21 U. S. C., §§ 321 (n), 343, 352). To the best knowledge of Plaintiff and its attorneys there is no published book or standards which specify with certainty whether labeling or literature is false or misleading. By reason thereof, whether or not criminal or civil proceedings are instituted against any person because of the alleged misbranding of their product depends en-

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tirely upon the views, interpretation, and policy of said Food and Drug Administration as the same then exist, with the consequent uncertainty in the minds of the industry, notwithstanding their conscientious efforts to avoid misbranding, as to whether a product distributed by them will cause said Administration to institute civil or criminal proceedings against them. By reason thereof and with said circumstances in mind, Plaintiff stated to said Chief that should any question arise at any time in the future concerning the alleged misbranding of any product distributed by Plaintiff or in connection with any phase of Plaintiff's business or operations, that said Food and Drug Administration notify Plaintiff thereof immediately, and that upon such notification Plaintiff would do its utmost to comply with the views of the Food and Drug Administration.

10. On September 15, 1948, a secret indictment was returned in the United States District Court for the Southern District of California, Central Division, against Lee S. Mytinger, William S. Casselberry (the two principal stockholders of Plaintiff corporation) and Carl F. Rehnborg, for an alleged violation of the Federal Food, Drug and Cosmetic Act, charging two counts each of misbranding and fraud in connection with two interstate shipments of the aforesaid food product Nutrilite Food Supple-

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ment made in January, 1947. The basis for said indictment was certain literature which had been withdrawn from circulation by Plaintiff approximately 14 months prior thereto and the edition of the booklet "How To Get Well and Stay Well" which had been withdrawn from circulation by Plaintiff approximately 5 months prior to the return of said indictment, as more fully set forth in Paragraph 8 hereof, and of which withdrawal the Food and Drug Administration had prior notice as aforesaid.

11. Subsequent to the return of said indictment, the Defendants instituted or caused to be instituted and commenced numerous libel actions against certain of Plaintiff's products, and has made or caused to be made without prior notice to Plaintiff seizures thereof at the following localities and on or about the following dates, in connection with said libel actions:

Belleville, New Jersey	September 30, 1948.
New York City, New York	October 14, 1948.
Buffalo, New York	October 28, 1948.
Hastings, Nebraska	November 24, 1948.
Belleville, New Jersey	December 15, 1948.
Spokane, Washington	December 23, 1948.
Seattle, Washington	December 30, 1948.
Clarkfield, Minnesota	December 31, 1948.
St. Petersburg, Florida	January 4, 1949.
Chicago, Illinois	January 3 and 4, 1949.

Plaintiff has been informed by Defendant George P. Larrick, Assistant Food and Drug Commissioner, that he has approved additional seizures and based upon such information alleges that further and additional seizures and libels are

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being contemplated by Defendants. All of the several libels so already instituted in the several States by seizures as aforesaid, and those which are threatened, contain statements which are in substance identical and allege the misbranding of the said Nutrilite Food Supplement, and there are no separate issues of fact or of law which necessitate such numerous libels in the several States and the trial and determination of the several issues involved in any one of the said libels can and will determine the validity of the claims of the Plaintiff in and concerning the said Nutrilite Food Supplement and no necessity exists for harassing the Plaintiff with these numerous filed and threatened seizures and libels.

12. The libels filed as listed above have already directly caused Plaintiff's business to diminish from a gross volume of over $500,000 per month to a volume of approximately $400,000 per month and said libels have caused great and irreparable damage to the good will of Plaintiff's business and have greatly and irreparably damaged the morale and efficiency of Plaintiff's national distribution organization. If said threatened libels are filed and Plaintiff's product seized thereunder Plaintiff's good will and business will be almost completely destroyed and irreparably injured before Plaintiff can obtain a hearing and adjudication of the lawfulness of its said advertising and labeling under said Act.

13. Plaintiff further alleges that the Food and Drug Administration, through its officers and employees, has caused embargoes to be placed on Plaintiff's products in New York, New Jersey, Washington State, and Florida and various other localities in the United States by request to State and local health authorities; that such embargoes have generally been instituted prior to the institution of libel for condemnation proceedings; and that such embargoes are unwarranted and deliberately calculated to interfere with and ultimately destroy Plaintiff's business and good will.

14. Plaintiff alleges that the several packages, cartons and bottles of Nutrilite Food Supplement so seized at various times and places by and under the direction and authority of the Food and Drug Administration, all as hereinbefore alleged, exclusive of the seized booklets, have a retail value of several thousands of dollars and are being retained by Defendants or under their authority in the several jurisdictions wherein said seizures were made, and none of said property is available for sale by Plaintiff and cannot be sold while said libels are pending. If Defendants proceed with other seizures as they have threatened to do, a very large percentage, if not all, of Plaintiff's product now in the hands of its various sub-distributors, numbering approximately 5,000 in all, will be held by Defendants or under their authority for an indefinite period of time. Vitamin products such as those seized as aforesaid are sub-

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ject to deterioration and loss of potency by the passage of time, and by the time the respective libel actions can be determined said products will be unsalable and of no value to Plaintiff even if said libel actions are determined in its favor.

15. The business and good will of the Plaintiff are very valuable and this business and good will are threatened with total destruction by the said arbitrary and illegal action of the several defendants. By reason of the libels which have been brought and the seizures made thereunder, and of the threats of further similar libels and seizures, the business and good will of the Plaintiff is being harassed and destroyed and its property is greatly depreciated.

16. The prosecution of such libels in various courts in widely separated parts of the United States is deliberately calculated by Defendants to be oppressive and it will ruin and destroy the business and good will of the Plaintiff. Plaintiff further alleges that the institution of the various libels by the Defendants herein in widely separated parts of the United States is unreasonably oppressive and causes great and unnecessary expense to Plaintiff in employing counsel to defend such libel proceedings and that the threatened institution of further seizures in connection therewith will put Plaintiff to further and additional expense which will all result in the destruction of and irreparable injury to Plaintiff's business and good will. If such libels be prosecuted in widely

separated parts of the United States and in different jurisdictions, the business of the Plaintiff will be wholly broken up and its good will and its property completely destroyed prior to any adjudication of the merits of the claims of the Plaintiff or of the claims of Defendants with respect to Plaintiff's alleged misbranding of its said product. Furthermore, there is no provision of law requiring or permitting said Food and Drug Administration to reimburse Plaintiff for the loss of said product in the event of a determination of said libel actions in favor of Plaintiff and there is no provision for payment to Plaintiff for damages incurred through destruction of its business and good will by the actions of the Defendants.

17. Title 21, Section 334 (a), of the United States Code, prohibits the institution of more than one libel for condemnation based upon the same alleged misbranding unless the Administrator has probable cause to believe from facts found without a hearing by him or any officer or employee of the Federal Security Agency that the alleged misbranded article is dangerous to health or that the labeling thereof is fraudulent or would in a material respect be misleading to the injury or damage of the purchaser or consumer, or unless such alleged misbranding has been the basis of a prior judgment in favor of the United States in a criminal injunction, or libel for condemnation proceeding under said Statute. Plaintiff alleges that there has been no judgment

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in favor of the United States in any proceedings against Plaintiff, and that its product Nutrilite Food Supplement is not dangerous to health and that the labeling and advertising thereof is not and never has been fraudulent or misleading in any respect to the injury of any person.

18. Plaintiff alleges:

A. That the Administrator of the Federal Security Agency was twice requested to grant it a hearing prior to his determination that there was probable cause to believe that Plaintiff's product was misbranded, which determination, under Section 304 (a) of the Federal Food, Drug and Cosmetic Act, is a condition precedent to multiple seizures. In said written requests, Plaintiff stated that if officials or employees of the Food and Drug Administration requested said Administrator to make a determination that the advertising and labeling of Plaintiff's product were misleading in a material respect to the injury of purchasers or consumers thereof, Plaintiff most respectfully prayed that said Administrator grant it a hearing so that Plaintiff could present to him the full and true facts showing that the labeling of Nutrilite Food Supplement is not misleading in any respect. The Administrator was further advised that the consequences of an erroneous decision on the issue of probable cause would be that Plaintiff would be put out of business completely and irreparably damaged by the multiple seizures so authorized and threatened by Defend-

ants prior to any possible opportunity Plaintiff might have to defend itself against said erroneous decision. The Administrator twice denied this request for a hearing and made an *ex parte* determination that Plaintiff's labeling for its product, Nutrilite, is misleading. The United States District Court for the District of Columbia has held that the language of Section 304 (a) of the Act requires no such hearing by said Administrator prior to said probable cause decision.

B. Plaintiff's product Nutrilite Food Supplement is not dangerous, deleterious, or harmful to the public health or welfare and the experience of thousands of users prove that it is in fact extremely valuable as a health aid. Plaintiff's advertising and labeling is not in a material respect misleading to the injury or damage of purchasers or consumers thereof, and said *ex parte* decision of probable cause of said Administrator is erroneous in so concluding. There is no emergency requiring summary action against Plaintiff's product and Defendants have had and now have an adequate time within which they can grant Plaintiff a hearing, during which said time no person will be injured in any way. No person would be injured in any way if Defendants are enjoined from instituting further libel actions and from proceeding with other libel actions already filed until the first libel action listed above is finally determined.

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C. Because of the failure of Section 304 (a) of the Act, as interpreted as aforesaid, to provide for a hearing as a condition precedent to multiple seizures of its product under the facts set forth in this Complaint Plaintiff further alleges that Section 304 (a) of said Act is unconstitutional in that said section as interpreted denies to Plaintiff the due process of law guaranteed by the Fifth Amendment to the Federal Constitution.

D. Plaintiff will be injured as set forth in this Complaint in that its business, good will, and property will be irreparably damaged in the particulars set forth herein by the multiple seizures instituted or caused to be instituted by Defendants prior to a hearing in any of the multiple libel actions instituted by Defendants against Plaintiff and prior to any possible adjudication of the question of Plaintiff's compliance with labeling requirements of the Food, Drug and Cosmetic Act of 1938 in said libel actions. The extent of said irreparable injury would be increased many times if Defendants institute the libel actions threatened by Defendants and Plaintiff's business, good will, and property will be completely destroyed prior to any possible adjudication in any of the libel actions on the merits of Plaintiff's labeling of its product Nutrilite Food Supplement.

19. Plaintiff further alleges that the Food and Drug Administration, arbitrarily and for no legal, practical, or other reason, refuses to stipulate

with Plaintiff so as to permit the removal of the existing libels to the United States District Court, Southern District of California, as provided for in the Federal Food, Drug and Cosmetic Act, so as to permit Plaintiff to try the issues involved in such libel proceedings at a location where witnesses are available to Plaintiff and where Plaintiff can make a complete defense to such actions. Plaintiff further alleges that representatives of the United States Department of Justice have expressed their willingness to stipulate to the removal of the existing and pending libel actions to the Southern District of California, which is a District of reasonable proximity to the principal place of business of Plaintiff, to wit: the Southern District of California, but that said United States Department of Justice has refused and will continue to refuse to so stipulate unless and until approval to such stipulation is obtained from the remaining Defendants, and that said remaining Defendants do now refuse and at all times herein mentioned have refused to authorize such a stipulation by the Defendant Tom C. Clark, Attorney General of the United States, and that said refusal deprives Plaintiff of the opportunity of producing witnesses available to testify to competent, relevant, and material facts in said libel proceedings and thereby deprives Plaintiff of its opportunity adequately to defend said libel proceedings and each of them. Plain-

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tiff further alleges that notwithstanding the fact that said libels for condemnation and each of them are as provided by law under the control of the Defendant Tom C. Clark, Attorney General of the United States, and that said representatives of said Attorney General have as aforesaid expressed their willingness to stipulate for the removal of said libel proceedings to the United States District Court, Southern District of California, which is a District of reasonable proximity to Plaintiff's principal place of business, nevertheless, representatives of said Food and Drug Administration unreasonably, arbitrarily, and capriciously refuse to consent to such stipulation for such transfer notwithstanding the fact that said representatives of said Food and Drug Administration have admitted to Plaintiff that by reason of the great distances existing between the Districts of the United States District Courts in California and adjoining States, great hardship, inequities, and great expense would be thereby thrust upon Plaintiff.

20. Plaintiff further alleges that in addition to the duties and responsibilities of the Defendants with respect to the administration and enforcement of the Federal Food, Drug and Cosmetic Act, Defendants have deliberately and arbitrarily pursued and instituted a course of enforcement against Plaintiff herein which is de-

signed solely toward the harassment of Plaintiff and the complete and total destruction of their business and good will.

21. Plaintiff further alleges that the Defendants have pursued, are pursuing, or have caused to be pursued a course of enforcement of the Federal Food, Drug and Cosmetic Act, over and beyond their prescribed statutory duties, which are designed to harass and to ruin Plaintiff's business and good will prior to any adjudication of the merits of Plaintiff's labels and labeling.

22. Plaintiff alleges that under the provisions of Section 1009 (e), Title 5, U. S. C., the Administrative Procedure Act of 1946, it is entitled to have the determination of the Administrator of the Federal Security Agency that the Plaintiff is employing misleading labeling in connection with the sale of its product, judicially reviewed, declared void and set aside because it is arbitrary, capricious, unreasonable and unlawful, because it is not founded upon any proper facts, and because such determination under the facts herein alleged deprives Plantiff of his property without due process of law in violation of the Fifth Amendement to the United States Constitution.

23. Plaintiff neither desires to delay nor impede any proper administrative or judicial determination of the disputed questions of fact presented in the controversy with the Food and Drug Administration over the labels and labeling of Plaintiff's said products, but is hereby merely

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seeking to protect its property from multiple seizures and its business and good will from complete destruction until judicial determination of said questions can be had.

24. Plaintiff alleges that it has no plain, adequate or complete remedy at law to prevent the injury and threatened injury complained of herein.

25. All libels instituted by Defendants after the first libel which was filed in New Jersey as aforesaid and all seizures thereunder are unlawful and void because the Administrator of the Federal Security Agency has not lawfully performed the necessary conditions precedent of making a decision of "probable cause" as the basis for the multiple seizures described above and threatened by Defendants, said decision of the Administrator being required by Section 304 (a) of the Food, Drug and Cosmetic Act.

26. The Defendant Tom C. Clark, as Attorney General of the United States, is responsible for the institution of the multiple libel actions described herein and threatened in the future as the United States District Attorneys who have filed and who will file said actions have acted and will act under his direction. Said actions other than the first libel action described above are illegal and void and have been instituted by joint action of the Defendants in violation of Section 304 (a) of the Food, Drug and Cosmetic Act and the Fifth Amendment to the Constitution

of the United States, and in excess of the lawful authority of said Defendants.

Wherefore, Plaintiff prays the Court:

1. That it take jurisdiction of this case, and cause appropriate process to issue against the Defendants and each of them, and require the Defendants to answer this Complaint, as provided by the rules of this Court and the law.

2. That pending hearing herein, this Court forthwith cause to be issued a temporary restraining order in accordance with the rules of this Court and Title 28 United States Code, Section 2284 (3), restraining the Defendants and each of them, their agents, servants, employees, and attorneys and all persons in active concert and participation with them, from instituting or causing to be instituted further libel actions against or seizures of Nutrilite Food Supplement until a hearing can be had on the temporary injunction prayed for herein.

3. That Defendants and each of them, and their successors in office and all persons acting or claiming to act under their authority, or by their direction, be restrained and enjoined temporarily, pending the final judgment herein, from continuing or causing to be continued the prosecution of any of the pending libel actions referred to in this Complaint, other than the first libel action referred to herein, and from instituting or causing to be instituted further libel actions

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against or seizure of Nutrilite Food Supplement until the final judgment herein.

4. That it find and decree all libel actions herein described, other than the first said libel action, illegal and void.

5. That it order Defendants to vacate, withdraw, and dismiss all libel actions, herein described, other than the first said libel action.

6. That Defendants be enjoined from proceeding in any of the libel actions described herein, other than the first libel action, until there is a final judgment in said first libel action.

7. That Defendants be enjoined from instituting or causing to be instituted further libel actions against or seizures of Nutrilite Food Supplement until there is a final judgment in said first libel action.

8. That the decision of probable cause made as described herein be held and declared to be illegal and void.

9. That, upon the final hearing of this cause, this Court find and declare that the multiple seizure provisions of Section 304 (a) of the Federal Food, Drug and Cosmetic Act of 1938, as applied to the Plaintiff under the facts set forth in this Complaint, are unconstitutional in that they deprive the Plaintiff of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

10. That Plaintiff be granted such other, further

and general and special relief as the nature of the case may require and the Court may deem proper and just in the premises.

Respectfully submitted.

WILLIAM S. CASSELBERRY,
President, Mytinger and Casselberry, Inc.
CHARLES S. RHYNE,
EUGENE J. BRADLEY,
LESTER L. LEV,
Attorneys for Plaintiff.

CHARLES S. RHYNE,
EUGENE J. BRADLEY,
730 Jackson Place NW., Washington, D. C.
LESTER L. LEV,
649 South Olive Street, Los Angeles, Calif.

DISTRICT OF COLUMBIA, *ss:*

William S. Casselberry, being first duly sworn upon oath, says that he is President of Plaintiff corporation, that he has read and is familiar with the foregoing complaint; that he is familiar with the facts therein set forth and that such facts are true except as to matters alleged upon information and belief, which matters to the best of his information and belief are true.

WILLIAM S. CASSELBERRY.

Subscribed and sworn to before me this ------ day of March 1949.

[SEAL] ——— ———,
Notary Public, D. C.

My commission expires December 18, 1950.

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In the United States District Court for the District of Columbia

Civil Action No. 5208–48

MYTINGER AND CASSELBERRY, INC., A CALIFORNIA CORPORATION, 1724 SANTA FE AVENUE, LONG BEACH, CALIFORNIA, PLAINTIFF

v.

OSCAR R. EWING, ET AL., DEFENDANTS

MOTION FOR TEMPORARY INJUNCTION

Now comes the Plaintiff in the above entitled cause and moves that the Court grant a temporary injunction herein, pendente lite, as prayed for in the Complaint, and in support of this Motion states:

1. The facts set forth in the Complaint and the affidavits attached thereto show that unless restrained Defendants have done and threaten to do acts which will immediately and irreparably injure Plaintiff by completely destroying Plaintiff's business prior to a determination of the merits of the controversy between Defendants and Plaintiff over the labels and labeling of Plaintiff's product.

2. It would be unjust and inequitable to allow Defendants to carry out their acts and threatened acts under the facts set forth in said Complaint and affidavits with the result as aforesaid.

3. Plaintiff has no adequate remedy at law to prevent said immediate and irreparable injury nor can Plaintiff recover damages to compensate for said

injury if the merits of the said controversy are finally determined in Plaintiff's favor.

4. The product of Plaintiff, the labels and labeling of which is in controversy, has been proved to be beneficial to human beings and no claim has been made by Defendants in any of their proceedings against Plaintiff that the contents of said product are harmful in any way.

5. All of the questions of facts and law in the controversy between Plaintiff and Defendants over said labels and labeling can be determined in one libel action and all other such actions are therefore purely oppressive and unreasonably instituted under the facts as set forth in the Complaint and the affidavits attached thereto.

6. The statute under which Defendants purport to act as already construed herein to deny Plaintiff a hearing prior to destruction by Defendants of its business, goodwill, and property, is unconstitutional as applied to Plaintiff under the facts of this case.

Respectfully submitted.

CHARLES S. RHYNE,
EUGENE J. BRADLEY,
LESTER L. LEV,
Attorneys for Plaintiff.

CHARLES S. RHYNE,
EUGENE J. BRADLEY,
730 Jackson Place NW., Washington 6, D. C.
LESTER L. LEV,
649 South Olive Street, Los Angeles, Calif.

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(Caption.)

MOTION TO DISMISS

Come now the defendants, by their attorneys, and move this Honorable Court to dismiss this action pursuant to the provisions of Rule 12 (b), as amended, of the Federal Rules of Civil Procedure, for the reason that the complaint fails to state a claim against defendants upon which relief can be granted.

A statement of points and authorities in support of this motion is filed herewith.

This ------ day of March 1949.

ALEXANDER M. CAMPBELL,
Assistant Attorney General.
GEORGE MORRIS FAY,
United States Attorney.
VINCENT A. KLEINFELD,
Attorney, Department of Justice.
Attorneys for the Defendants.

AFFIDAVITS IN OPPOSITION TO MOTION FOR TEMPORARY INJUNCTION

Affidavit of Paul B. Dunbar, Commissioner of Food and Drugs

DISTRICT OF COLUMBIA,
City of Washington.

Before me, John A. Murphy, a Notary Public of the District of Columbia, personally appeared the undersigned, Paul B. Dunbar, in the District aforesaid, who, being first duly sworn, deposes and says:

1. I am the duly appointed Commissioner of Food and Drugs. I have examined the booklet "How to Get Well and Stay Well" in the several forms encountered by inspectors of this Administration. There are set forth below some of the more obvious falsifications therein which precipitated our recommendation of multiple seizures.

2. The booklet, "How to Get Well and Stay Well", is used by house to house canvassers to promote the sale of "Nutrilite" products. The booklet is loaned to prospective purchasers for a sufficient period to enable them to peruse it leisurely. The promises of benefit held out by the title, "How to Get Well and Stay Well", will naturally attract attention and will interest a great many people.

3. The title page elaborates upon the title of the book as follows: "If your health problem is the result of dietary deficiencies and If you want to get well and stay well, be sure to read this book." "Even If you are sure your diet has nothing to do with your ailment, read this book." * * * "If your health is good read this book and learn how to stay well." The allurement of such language is obvious. The number of potential customers for Nutrilite Products on this basis is well recognized by the Nutrilite promoters and is expressed by them in the following language on page 1 of the booklet.

> think of your friends and relatives, one after the other, and note how many are

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weak and lacking in energy, having trouble digesting their food or suffering with actual stomach pains, with decaying teeth, trouble with their hearts and other important organs, and with aches, pains, and discomfort in various parts of their bodies.

Think of your friends and relatives and note how many, in the last six months, have been to doctors or hospitals for treatment.

Think of those who *should* be having physical help of some kind, but who are not receiving it. And finally think of people you know, your age and younger, who have died in the last year, prematurely."

Such suggestions readily set the stage for the conclusion obviously intended: "Buy Nutrilite."

4. On page 3 are discussions of "your brain," "your heart," "glands," "teeth," the insinuation being that Nutrilite will keep these organs in proper working condition.

5. On page 5 is a display headed "22 Million Children Need Corrective Treatment." There appears a picture of an obese child and another of "skin-and-bones" type together with references to bad teeth, glandular disturbances, improper nourishment, tuberculosis, and spinal curvatures, followed by the statement "90% of the Conditions Above Originate in Deficiency of Protective Food Factors" and the large question "What's Wrong?" Presumably it is the lack of Nutrilite.

6. On page 6 under the heading "Some Obvious Conclusions" occurs the statement,

> Obviously it is better to *keep* your body in splendid condition. But if your body has already begun to break down, as is the case with most of us, and which you recognize through your aches, pains, inconveniences, and doctor's diagnoses, you can still do much toward returning it to its basic and natural condition of health. But before we tell you exactly how to do this
> * * *

If "exactly how to do this" is anything other than taking "Nutrilite" the author of the book forgot to complete his story.

7. Pages 7, 8, and 9 give the "Story of a Remarkable Discovery Nearly Thirty Years Ago" which purports to be the story of how Carl Rehnborg, the originator of the Nutrilite business, through the addition of green plants, including alfalfa, one of the Nutrilite constituents, to the food of Chinese babies made them healthy—a result he had not been able otherwise to accomplish. Then, it is asserted that Americans fed his specially prepared supplement are better able to stand the deteriorating effects of life in China. Mr. Rehnborg, according to the account, spent six years of "intensive study and experimentation to improve his food supplement" leading to "the creation of the present amazing food supplement"—unnamed at this point, but obviously "Nutrilite."

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8. On page 10 it is stated that "the purpose of this book—and the objective of the person who lent you this book—is to bring you to the point where you will recognize the fact clearly that your illness and the illness of your family is, in almost every case, the result of a failure to supply your body and the bodies of the members of your family with the vital food factors." In other words, the answer to all ailments, from brain tumors to falling arches, is Nutrilite.

9. On page 11 the reader is informed that the book "* * * supplies the answer to the enigma of modern medicine." With such a promise it will not be difficult to sell the credulous reader a year's supply of the product at $200.00 especially as the cost is payable on the installment plan.

10. On page 13 the "protective food factors * * * that enable us to convert our ordinary foods into energy, new skin, blood and cells, and which make it possible for the body chemistry to operate correctly" are at last named—nutrilites.

11. On pages 13 and 14 the discoveries of a Swiss biochemist, a Dutch physician in charge of a prison hospital in Java, a Japanese physician, and an American biochemist are related in a fashion to build up the idea that the results of these discoveries and investigations are reflected in "Nutrilites," the conqueror of disease.

12. Pages 16, 17, 18, and 19 consist of a discussion of the various vitamins, leading up to

"What doctors say about vitamins." After stating that there are doctors who recommend "Nutrilite", it is reported that "many doctors * * * are antagonistic to the whole idea of health developed in a non-medical manner * * *". The text proceeds to enable the reader "to understand this attitude", that is, how doctors depend on medicine and don't understand diets, including of course Nutrilite, the great desideratum in the acquirement and maintenance of health.

13. Pages 23 to 26, inclusive, condition the reader for the appeal of Nutrilite salesmen by frightening him with a discussion of the "enemies of Health" which are "Depleted Soil, Improper Cooking, Processing, Storage & Shipping Delays Resulting in: devitalized, demineralized and denatured foods."—the reader must be thankful that he has lived long enough to learn about Mr. Rehnborg's monumental contribution to the science of health maintenance.

14. Page 37 of the edition of "How to Get Well and Stay Well" upon the basis of which the first seizures were made refers to low vitality, overfatigue, insomnia, poor appetite, gastro-intestinal distress, recurrent vague aches and pains, weak eyes, and defective teeth with the question, "Is there a Solution?" and the answer "There is!" The pages following suggest that "Nutrilite" is that answer. Thus on page 38 occurs the statement, "be sure to remember that it

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isn't just the extreme and well-pronounced ailment that proves your need for Nutrilite." On page 40 is the statement, "The following are accounts of people who used Nutrilite to build their bodies." This is followed by a particularly intriguing explanation, namely "* * * when we tell you about these cases where a set of symptoms disappears after Nutrilite is used for a period of time, please remember that never should you consider the symptoms eliminated or a disease cured *by Nutrilite.* Remember that Nutrilite never cures anything. Nutrilite provides the body with needed nutrilites and other vital microfood factors. The body takes these and rebuilds. In the process of rebuilding, the inner cause of the deficiency ailment disappears, and consequently the symptoms cease to bother. Then the person is well, and he *got well through the use of Nutrilite,* but nothing was cured." One must agree with the author's statement that "This may seem like a fine distinction."

15. On page 41 the author's conscience seems to have necessitated the following brief admission that Nutrilite is not omnipotent. "It should be recognized clearly that the set of symptoms in which you are most interested may never disappear following the use of Nutrilite Food Supplement * * * Nutrilite may supply 100 bodies in succession with the materials they need to rebuild and eliminate a certain condition, but this does not prove beyond doubt that the 101st

person will derive the same benefit." For fear the reader may imagine he is the 101st person the author adds "Sometimes the only way to find out is by adequate trial."

16. Some of the stories told in pages 41 to 54 include that of a man who spent all his time on a chair or in bed ill for a year, was pronounced hopeless, and was on the point of having his foot amputated. He was enabled to return to work after taking Nutrilite. Another person, "afflicted with a variety of complications" having "tried various drug-store remedies" and "vitamin and mineral supplementary foods obtained at health food stores," had a violent attack accompanied by severe abdominal pains and splitting headache * * *. "He expected his heart beat to discontinue at any second." The next day his supply of Nutrilite arrived. Since that time he has had but one light attack and after three months he was back at his job. Of the 19 disorders he experienced before he began the use of Nutrilite, only three, which did not include the heart difficulty, remained and these "only slightly." A lady who could not endure the altitude of Colorado before taking Nutrilite was able to take a vacation at a location where she was more than 13,000 feet above sea level. After having the benefit of Nutrilite another lady with terrific pains in her joints and through her hips who had been taking treatments for a number of years was completely free from pain after two months.

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The author immediately admits that these cases may seem somewhat spectacular but he says that they were not exceptional. Numerous testimonials of the same general tenor complete the booklet.

17. The booklet is so false that informed, discriminating persons would not be misled nor deceived by it, but those suffering, trusting people who are ill and are seeking relief from their ailments, of whom there are vast numbers, will be led to invest in these simple vitamin and mineral dietary adjuncts for relief, only to be disillusioned at the end of their experiments induced by the glowing promises held out in the booklet.

18. Following the first seizures, the promoters ordered their agents to remove from the "How to Get Well and Stay Well booklet," pages 37 to 54, inclusive, which contained the most blatant of the misrepresentations. The first 36 pages, however, will produce the same general effect on the minds of the reader in a more subtle but none the less certain fashion. The most recent editions of the booklet contain several additional pages which do not mitigate the unjustifiable insinuations in the first 36 pages.

19. The latest edition of "How to Get Well and Stay Well" which has come to our attention is the 42-page booklet accompanying plaintiff's petition, identified as Exhibit "A". This booklet, which apparently was published following the

institution of seizure actions involving Nutrilite, contains a page headed "Foreword" in which the reader is informed that there are a few limitations to which the title "How to Get Well and Stay Well" are subject. Exceptional cases for which even Nutrilite will not be effective are:

(1) A person "breathing his last few breaths at the age of 110"
(2) One "on his death bed with cancer"
(3) One "in a diabetic coma" and
(4) One "about to die of typhoid fever"

Also there are cases in which even Nutrilite will not enable one to stay well if the user is determined not to stay well. These cases are (1) taking too much alcohol; (2) taking dope; (3) overdoing; (4) exposure; (5) denying themselves important items of diet such as proteins or carbohydrates.

With these concessions the text continued for thirty-five pages with essentially the same phraseology as is involved in the earlier editions of the book already described.

20. Pages 36 to 42, of this booklet, are new. The same frightening tactics, however, are continued. Such headings as "Are You Starving Your Body?" "How You Can Starve in the Midst of Plenty," and the paragraphs thereunder are designed to convince the reader that he must invest in Nutrilite if he expects to avoid disaster.

21. On pages 39 and 40 are given the "Conclusion" which the reader is expected to have reached

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from a perusal of the booklet including the "noteworthy" fact that babies in China did not improve as they should until the plant extracts or concentrates developed by Mr. Rehnborg were added to their diets. This same "plant concentrate" helped Europeans in the Orient to better health and made it easier for them to withstand the deteriorating effects of living in China. Nutrilite originally consisted entirely of the "plant concentrate." Subsequently vitamins were added to improve the already marvelous Nutrilite. The sufferer with dietary deficiencies and ailments can get all the basic food factors needed from Nutrilite Food Supplement; while one who is reasonably well and wishes to stay that way can turn to—Nutrilite Food Supplement.

22. One has difficulty after carefully perusing and analyzing this booklet to concur in the author's assertion "We believe the statements made in this book to be facts and we have tried, in this book, to stick to facts." The statements in the final paragraph to the effect that one should continue to take "needed medicine" when adding Nutrilite Food Supplement to the diet and the admission that there are conditions which require professional services appears to be designed to serve as a defense against the allegations that the previous portions of the booklet are grossly false.

Paul B. Dunbar.

PAUL B. DUNBAR.

Subscribed and sworn to before me this 16th day of March 1949.

JOHN A. MURPHY,
Notary Public.

Affidavit of George P. Larrick, Associate Commissioner of Foods and Drugs

District of Columbia,
City of Washington

Before me, John A. Murphy, a Notary Public of the District of Columbia, personally appeared the undersigned, George P. Larrick, in the District aforesaid, who, being first duly sworn, deposes and says:

1. I am the duly appointed Associate Commissioner of Food and Drugs. Upon the basis of the files of the Food and Drug Administration, Federal Security Agency, and my personal knowledge of the matters recited below, I am setting forth the significant details of this Administration's contacts with the drug "Nutrilite Food Supplement" and the firm of Mytinger and Casselberry and their representatives.

2. This product was first brought to the attention of the Administration in 1939 when Carl Rehnborg, president of Nutrilite Products Inc., submitted proposed labeling for vitamin capsules and mineral tablets called "Cal-Vitamin". The Administration advised him that "the circulars * * * are unwarranted practically in their entirety * * * The booklets contain a large

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number of statements which are unwarranted in the light of established therapeutic properties for vitamins * * * if this booklet is to be used under the jurisdiction of the Federal Food, Drug, and Cosmetic Act, it appears that it should be drastically revised." While the booklet "How to Get Well and Stay Well" now in use by Mytinger and Casselberry, Inc. differs from the original submitted by Mr. Rehnborg, it is subject to the same criticisms.

3. Factory inspections of Nutrilite Products, Inc., were made in October, 1941, March, 1942, April, 1944, and July, 1948. During the last inspection, Rehnborg stated that Mytinger and Casselberry had been the sole distributor for his preparation since 1945. Rehnborg disclaimed any responsibility for the promotional material put out by Mytinger and Casselberry and said that responsibility for labeling the articles had been turned over to them by a contract executed in September, 1945.

4. The first factory inspection of the firm of Mytinger and Casselberry was made at their Los Angeles office on December 5, 1946, by Inspector William E. Paxson [F. I. R. 12/5/46] who reported: "William S. Casselberry, Ph. D., partner, was interviewed and willingly gave any and all information requested. He stated that he did not have any knowledge of the Federal Food and Drug requirements, but that to the best of his knowledge he and his partner were conducting a

business 'open and above board' and that they wanted to comply with all laws that might govern their business. At this juncture no comment was made by this inspector other than to say that the two partners should be fully conversant with the food and drug laws and regulations as they pertained to their business. Upon request a copy of the Act was mailed to Mytinger and Casselberry the evening of 12/5/46."

5. On December 9, 1946, Inspector Eric A. Gray visited the office of Mytinger and Casselberry in Long Beach, California, for the purpose of reporting additional shipments of the products manufactured by them. Nothing was done or said by Inspector Gray that would indicate approval by him of the firm's labeling. The inspections carried out by Inspectors Paxson and Gray were of a routine nature consisting largely of acquiring sufficient information, relative to the practices of the firm in question, in order that the Food and Drug Administration could make a determination as to whether the Federal Food, Drug, and Cosmetic Act was being violated. The inspectors of the Food and Drug Administration are not qualified to, nor have they the authority to, determine with finality whether any labeling is in conformity with, or in violaton of the Act. This was made known to Mr. Mytinger by Inspector Gray.

6. Acting upon the information reported by Inspector Gray, the Food and Drug Administra-

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tion collected samples 82–031/33 H and 82–036 H consisting of various vitamin and mineral products marketed by Mytinger and Casselberry together with the printed matter being used at that time, including the booklet "How To Get Well and Stay Well."

7. On June 18, 1947, the Los Angeles Station sent a "Notice of Hearing" addressed to the partnership firm of Mytinger and Casselberry, Long Beach, California. The charge sheet specifically mentioned the articles collected under the above-mentioned sample numbers and alleged specifically that these articles were misbranded because statements in the booklet, "How To Get Well and Stay Well" and other labeling "are false and misleading, since they create the impression that the products are effective in the treatment of diseases and abnormal conditions mentioned therein, whereas they are not effective in the treatment of such diseases and abnormal conditions."

"The labels of the articles fail to bear adequate directions for use in the treatment of diseases and abnormal conditions mentioned in the above-listed labelings."

8. This hearing was accorded the firm of Mytinger and Casselberry pursuant to section 305 of the Federal Food, Drug, and Cosmetic Act [21 U. S. C. 335] to enable it to present informally its views with respect to the charges,

before the decision was made whether to report a violation of the Act to the proper United States Attorney for institution of criminal proceedings."

9. In response to the notice addressed to the firm of Mytinger and Casselberry there appeared, on July 15, 1947, at the office of the Los Angeles District, Carl F. Rehnborg, representing Nutrilite Products, Inc., Lester L. Lev, Attorney for Nutrilite Products, Inc., Lee S. Mytinger, William S. Casselberry, and Lee J. Myers, an attorney, representing the firm of Mytinger and Casselberry. The "Record of Hearing" in the Administration files shows that the firm of Mytinger and Casselberry understood the charges; that it admitted that the literature mentioned in the charges was prepared by it; and that its attorney, Mr. Myers, stated that he would personally revise all the labeling including the literature so as to bring it into harmony with the Act in line with the charges.

10. Following review by this Agency of the citation of July 15, 1947, citation was issued September 16, 1947, on the same sample numbers to Lee S. Mytinger, William S. Casselberry and Carl F. Rehnborg, as individuals, and to Nutrilite Products Co. Written responses on behalf of Lee S. Mytinger and William S. Casselberry were made by Attorney Myers' letter of October 4, 1947. In a separate letter of the same date he replied for Nutrilite Products Co. and Carl F. Rehnborg. In his reply for Mr. Mytinger and

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Mr. Casselberry, Mr. Myers stated that the revision of the labeling had been built around one theme which he summarized as follows: "Nutrilite Products are foods for use as a supplement to the regular diet; they do not cure, and are not offered as a cure for anything; their chief purpose is that of a food—to nourish the body and to provide it with materials for its proper growth and function." Printers' proofs of the revised labels of several of their products were enclosed with the letter replying for Carl F. Rehnborg and Nutrilite Products Co., but no proofs of alleged revisions of the booklet or other labeling were enclosed. Mr. R. B. Born, Assistant to the Chief, Los Angeles Station, contacted Mr. Myers by telephone and suggested that he might care to submit additional information with respect to the labeling and labels. On November 3, 1947, a letter was received by the Los Angeles Station from Mr. Myers in which he stated that the various pamphlets heretofore distributed by the firm had been destroyed and discontinued and that the booklet, "'How To Get Well and Stay Well' has been entirely revised and the old copy discontinued." No proofs of the alleged revised booklet were enclosed.

11. On November 5, 1947, Inspector A. D. Catterson, Jr., made a follow-up inspection of the Long Beach office of Mytinger and Casselberry to ascertain the type of labels and literature in use during the period July 15 to November 5, 1947.

He obtained three kits containing literature which ordinarily are sent to prospective salesmen. In one of them, he found certain of the pamphlets which Mr. Myers, in his letter dated November 3, 1947, stated had been discontinued and destroyed. At this inspection Dr. Casselberry refused to permit the inspector to examine the firm's files to determine what shipments of their products were made.

12. On February 16, 1948, Mr. Lev, the Secretary and legal adviser for Nutrilite Products, Inc., contacted the chief of the Los Angeles District by telephone requesting an interview. On February 18, 1948, Mr. Lev appeared at the office of the Los Angeles District accompanied by Mr. Rehnborg, Mr. Mytinger and Mr. Casselberry. Mr. Lev stated that under Mr. Myers' supervision a complete revamping of the labeling had occurred and expressed the desire to submit copies of their new printed matter and secure our comment thereon. They were told that they were at liberty to present their new labeling and any other information they thought appropriate to supplement their statements at the hearing. Mr. Roe, Chief of the Los Angeles District, pointed out that he could not undertake to offer any comment as to the suitability of the labeling at this time because of the possibility of criminal proceedings being brought on the basis of the charges in the citations of June 18 and September 16, 1947. No such labeling was submitted. Affiant is informed

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and believes that nothing was said by Mr. Roe that could be interpreted by the plaintiff as meaning that their labeling was free from criticism, or that the investigations beng conducted at that time would not, if the facts warranted, result in legal proceeding being brought against them.

13. An examination of plaintiffs' exhibit "A" attached to the complaint, which plaintiffs allege is the current revised edition of the booklet "How To Get Well and Stay Well," shows that the "revised" booklet is subject to the same criticism as the old booklet and that its dissemination results in violation of the Federal Food, Drug, and Cosmetic Act by Lee S. Mytinger, William S. Casselberry, the firm of Mytinger and Casselberry and the product Nutrilite itself.

14. On May 13, 1948, this Agency recommended that criminal proceedings be instituted, and on or about September 20, 1948, a Grand Jury sitting in the jurisdiction of the United States District Court for the Southern District of California, Central Division, returned a true bill indicting Mytinger and Casselberry, a partnership, and Lee S. Mytinger, William S. Casselberry and Carl F. Rehnborg, as individuals, for violations of the Federal Food, Drug, and Cosmetic Act.

The defendants, having moved to dismiss two counts of the indictment, sought to have the Food and Drug Administration agree to make no more seizures as a result of their agreement with Assistant United States Attorney Klinger to let

the motion go off the calendar while waiting for a determination of a similar issue then before the United States Supreme Court. They were informed that this Agency could not enter into such an agreement. At no time did this Agency represent or suggest that no further seizures were contemplated. It is true that the Los Angeles District contemplated no further seizures and if such a statement be attributed to Mr. Roe it is a fact that no other seizures were recommended or made by the Los Angeles District.

15. To the best of affiant's knowledge and belief the following action has been taken with respect to seizure of the drug "Nutrilite":

F. D. C. No. 25789	9/29/48	Recommendation by this Agency that U. S. Attorney institute proceeding for seizure and condemnation.
	9/30/48	Libel filed in the District Court of The United States for the District of New Jersey. No. C-11705.
	10/ 6/48	Seizure by U. S. Marshal at Belleville, N. J.
F. D. C. No. 25810	9/30/48	Finding of fact and conclusion by Associate Commissioner of Food and Drugs, C. W. Crawford that the labeling of the drug "Nutrilite" is in a material respect misleading to the injury or damage of the purchaser or consumer. (Certified copy of Finding and Conclusion attached.)
	10/ 6/48	Recommendation that seizure proceedings be instituted.
	10/14/48	Libel filed in Southern District of New York. No. A158-153.
	10/19/48	Seizure by U. S. Marshal at New York City, N. Y.

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F. D. C. No. 25975	10/25/48	Recommendation that seizure proceedings be instituted.
	10/27/48	Libel filed in Western District of New York. Civil No. 3902.
	10/28/48	Seizure by U. S. Marshal at Eggertsville, N. Y.
F. D. C. No. 26085	11/18/48	Recommendation that seizure proceedings be instituted.
	11/24/48	Libel filed in the District of Nebraska, Hastings Division, Civil No. 221.
	12/ 1/48	Seizure by U. S. Marshal at Minden, Nebr.
F. D. C. No. 26123	12/ 2/48	Finding of fact and conclusion by Associate Commissioner of Food and Drugs, G. P. Larrick. (Certified copy of finding and conclusion attached.)
	12/ 8/48	Recommendation that seizure proceedings be instituted.
	12/15/48	Seizure by U. S. Marshal at Belleville, New Jersey.
F. D. C. No 26140	12/ 9/48	Finding of fact and conclusion by Commissioner of Food and Drugs, P. B. Dunbar. (Certified copy of finding and conclusion attached.)
	12/16/48	Recommendation that seizure proceedings be instituted. No seizures made because article not available.
F. D. C. No. 26141	12/16/48	Recommendation that seizure proceedings be instituted.
	12/23/48	Libel filed in the District of Minnesota, Second Division.
	12/31/48	Seizure by U. S. Marshal at Clarkfield, Minnesota.
F. D. C. No. 26142	12/16/48	Recommendation that seizure proceedings be instituted.
	12/22/48	Libel filed in Eastern District of Washington, Northern Division. No. 781.
	12/23/48	Seizure by U. S. Marshal at Spokane, Washington.
F. D. C. No. 26143	12/16/48	Recommendation that seizure proceedings be instituted.
	12/30/48	Seizure by U. S. Marshal at Seattle, Washington.

F. D. C. No. 26144	12/16/48	Recommendation that seizure proceedings be instituted.
	12/29/48	Libel filed in Northern District of Illinois, Eastern Division. No. 48C1935.
	1/ 3/49	Seizure of Nutrilite by U. S. Marshal at Chicago, Illinois.
	1/ 4/49	Seizure of literature by U. S. Marshal at Chicago, Illinois.
F. D. C. No. 26068	12/23/48	Recommendation that seizure proceedings be instituted.
	12/31/48	Libel filed in Southern District of Florida.

16. On November 12, 1948, Mr. Lev, Mr. Mytinger, and Dr. Casselberry requested an appointment with affiant. When they arrived they stated that they had talked with Mr. Kleinfeld of the Attorney General's office who informed them that the Attorney General's office was not disposed to enter into any stipulation consolidating all seizure actions for trial in the Southern District of California unless the Food and Drug Administration agreed. I informed them that we had given careful consideration to our policy with respect to the removal of seizure actions for trial and that it is our judgment that the enforcement of the Federal Food, Drug, and Cosmetic Act will suffer if precedents are established permitting claimants, by stipulation, to transfer seizure cases to the Federal district in which they maintain their place of business. I informed them that it was the policy of the Administration to insure, as far as posisble, a fair trial by agreeing to removal only to a neutral district. At no time did I state or suggest that such a

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policy is unfair or inequitable. Affiant believes that the best interests of the public will be served only if such a policy is maintained.

17. On January 28, 1949, the Administrator signed conclusions, based on the findings of Dr. R. C. Butz, identical with the ones signed by Mr. Crawford, Mr. Larrick, and Dr. Dunbar, that the labeling of the drug "Nutrilite Food Supplement" is in a material respect misleading to the injury or damage of the purchaser or consumer.

18. This Agency has no control over the several United States Attorneys. The decision to institute proceedings for violations of the Federal Food, Drug, and Cosmetic Act is within the exclusive control of the said United States Attorneys. The function of this Agency in that regard is to report to the United States Attorneys that violations have occurred and to suggest to them that appropriate proceedings be instituted. This Agency exercises no control over the litigation of these causes. When asked for its opinion as to removals, this Agency has suggested to the several United States Attorneys that they not stipulate for removal of seizure actions for trial in the home district of the claimant. It has been suggested to them that removal to any district of reasonable proximity to claimant's home district will meet with this Agency's approval. At no time before, during or after the seizures of Nutrilite has this Agency suggested to the United States attorneys that the above-mentioned policy

be varied in any respect. Knowing that it was the purpose of Mr. Lev to attempt to negotiate a removal of these cases to Los Angeles, the Administration called the attention of its inspectors to the fact that Mytinger and Casselberry had its principal place of business in that district, suggested that this information be given to the United States Attorneys involved.

19. The seizure of claimants' property has been made under orders of the various United States District Courts and the seizures themselves have been consummated by duly appointed United States Marshals of the respective District Courts. This Agency is not in possession, nor does it have any control over the seized property, said property being in the exclusive possession and control of the various United States Marshals acting under authority of orders of court.

20. This Agency has no intention of harassing claimants or of putting them out of business before they have the opportunity to defend the various actions brought against their products. On the contrary, it is the desire of this Agency to proceed to trial as soon as the several courts or any one court in which the actions may be consolidated for trial can hear them, in order that a judicial determination may be had as to the charges so that this Agency may more effectively protect the health and pocketbooks of the consuming public.

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21. Affiant is informed and believes that plaintiffs have no defense to the charges in the various libels of information and that by insisting on consolidation and removal to the district in which they have their principal place of business and by bringing this action they hope to delay judicial determination as long as possible while they continue to mulct the public at the rate of $500,000 per month.

George P. Larrick,
GEORGE P. LARRICK.

Subscribed and sworn to before me this 16th day of March 1949.

JOHN A. MURPHY,
Notary Public.

(Caption.)

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

After hearing oral argument in open Court in the above-entitled cause, it is this 7th day of April 1949.

ORDERED, that the defendant's motion to dismiss be and the same hereby is denied.

(S) BENNETT C. CLARK,
Judge.

(S) T. ALAN GOLDSBOROUGH,
Judge.

(S) EDWARD A. TAMM,
Judge.

In the United States District Court for the District of Columbia

Civil Action No. 5208–48. Filed Apr. 6, 1949

MYTINGER & CASSELBERRY, INC., PLAINTIFF

v.

OSCAR R. EWING, ET AL., DEFENDANTS

TEMPORARY INJUNCTION

Upon the foregoing complaint and the various prayers for relief, it is by the United States District Court for the District of Columbia, this 6th day of April 1949.

Adjudged, ordered, and decreed, that the plaintiff be granted a temporary restraining order in accordance with the rules of this Court (28 U. S. C. 2284 (s)), restraining the defendants and each of them, their agents, servants, employees, and attorneys and all persons in active concert and participation with them, from instituting or causing to be instituted further libel actions against or seizures of Nutrilite Food Supplement until a hearing can be had on the temporary injunction prayed for herein, and it is further

Adjudged, ordered, and decreed, that defendants and each of them and their successors in office and all persons acting or claiming to act under their authority, or by their direction, be restrained and enjoined temporarily pending the final judgment herein, from continuing or causing to be continued the prosecution of any of the

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pending libel actions referred to in the complaint, other than the first libel action referred to therein, and from instituting or causing to be instituted further libel actions against or seizures of Nutrilite Food Supplement until the final judgment herein, provided, that before the issuance of this restraining order, plaintiff file bond of Two Hundred Fifty Dollars ($250) in the usual terms, for protection of the defendant.

(S) BENNETT CHAMP CLARK.
(S) T. ALAN GOLDSBOROUGH.
(S) EDWARD A. TAMM.

In the United States District Court for the District of Columbia

Civil No. 5208–48

MYTINGER & CASSELBERRY, INC., PLAINTIFF

v.

OSCAR R. EWING, ET AL., DEFENDANTS

ANSWER TO AMENDED COMPLAINT FOR TEMPORARY AND PERMANENT INJUNCTION

First Defense

Defendants without waiving the motion to dismiss previously made and ruled on herein, move to dismiss this suit on the further ground that this court has no jurisdiction over the subject matter defined by this court in the pretrial conference before Judge Tamm on April 13, 1949, for the reasons that:

1. This court intends to try the fact issue of whether the labeling in question is materially misleading (Transcript of Pre-Trial Conference, pp. 4, 28, 37), which determination of fact is by statute (21 U. S. C. 334 (a)) vested exclusively in the Federal Security Administrator.

2. This court has jurisdiction solely to try the issue of the constitutionality of Section 304 (a) of the Federal Food, Drug, and Cosmetic Act [21 U. S. C. 334 (a)], for the reason that every other issue in this action was considered and disposed of by Judge Pine in an order dismissing the complaint on March 3, 1949, and granting leave to Plaintiff to amend only to raise the issue of constitutionality.

Second Defense

For a second, separate, and distinct defense, Defendants move to dismiss on the ground that the court is without jurisdiction to entertain this suit because it is in substance and effect against the United States, which has not consented to be sued or waived its immunity from suit.

Third Defense

Each numbered paragraph of this defense corresponds with and is addressed to the averments contained in the like numbered paragraphs of the amended complaint.

1. Defendants admit the allegations of paragraph 1 of the complaint.

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2. Defendants deny the allegations of paragraph 2 of the complaint, except that they admit that this suit arises as a consequence of multiple seizure actions taken under Section 304 (a) of the Federal Food, Drug, and Cosmetic Act (21 U. S. C. 334 (a)).

3. Defendants admit that Plaintiff has been the exclusive distributor of "Nutrilite" since September, 1945. Defendants admit the composition of Nutrilite, that it is sold in connection with the booklet "How to Get Well and Stay Well," and that statements and representations concerning Nutrilite are made in labels upon the bottle, upon the carton, and in said booklet.

Defendants admit that the booklet contains what purports to be a general discussion of nutrition, the need for vitamins and minerals in nutrition and the deficiency conditions which can result from the lack of such factors in the diet, but Defendants allege that said discussion is incomplete, inaccurate and misleading and that it conveys the erroneous impression that most of the diseases, symptoms, and conditions mentioned therein are caused by dietary deficiencies and that such diseases, symptoms, and conditions may be prevented or cured by the use of "Nutrilite Food Supplement" when such is not the case.

Defendants have no information sufficient to form a belief as to whether the statements contained in the booklet were prepared under scientific and legal direction. Defendants deny

each and every other allegation contained in paragraph 3.

4. Defendants admit that the substances or materials or combinations thereof contained in "Nutrilite" are not, in and of themselves, harmful and deleterious to human users. Defendants allege that the use of "Nutrilite' for the diseases, symptoms, and conditions suggested and implied in the labeling may be harmful in that proper medical treatment for these conditions, symptoms, and diseases may be postponed to the detriment of the health of the consumer.

Defendants deny that any scientific tests or experience of users demonstrate that the product "Nutrilite" is helpful to the health of human beings in the treatment of many of the diseases, symptoms and conditions as suggested or implied in the booklet "How to Get Well and Stay Well," and deny the remaining allegations of the paragraph.

5. Defendants admit that Plaintiff distributes "Nutrilite Food Supplement" in interstate commerce, but deny that the business is built upon sound and honest business practices. Defendants deny that the plaintiff has marketed this product since 1933. Defendants deny each of the other allegations contained in paragraph 5.

6. Defendants admit the allegations of paragraph 6 of the complaint except that defendants allege that such visit was made by one inspector on December 5, 1946.

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7. Defendants deny each and every allegation contained in paragraph 7.

8. Answering paragraph 8, defendants admit the allegations contained in the first two sentences thereof except that defendants deny that the objections of the Food and Drug Administration to the booklet "How to Get Well and Stay Well" and certain other literature were not specified.

Defendants deny that the plaintiff did immediately discontinue the use of the booklet after said hearing, but admit that counsel for the defendants stated that the labeling would be drastically revised to eliminate claims of therapeutic or curative effect and to offer the article for sale as a food.

Defendants further deny that the revised booklet was in a form which conformed to the views of the Food and Drug Administration, and allege that Plaintiff did not submit to the Food and Drug Administration for comment copies of the so-called revised booklet "How to Get Well and Stay Well" prior to its publication and dissemination.

Defendants have no information sufficient to form a belief with respect to Plaintiff's alleged independent analysis of the product "B & E" Nutrilite Food Supplement, but allege that the Food and Drug Administration's analyses showed deficiencies in vitamin content.

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Defendants have no information sufficient to form a belief as to whether the labels of the product "B & E Nutrilite Food Supplement" do presently comply with the Federal Food, Drug, and Cosmetic Act.

9. Defendants admit the allegations contained in the first paragraph of paragraph 9, except that defendants deny that the Chief of the Los Angeles station of the Food and Drug Administration stated or implied in any manner that said investigation and interrogations were merely "routine" in nature or that the Plaintiff's labeling was not suspected of being in violation of the Federal Food, Drug, and Cosmetic Act.

Answering the second paragraph of paragraph 9, Defendants deny the allegations contained therein, except that Defendants admit that there is no published book of standards which specify whether labeling is false or misleading, as this is an issue of fact to be determined in each case in the Federal Courts. Defendants further admit that Plaintiff stated to the Chief of the Los Angeles District of the Food and Drug Administration that Plaintiff should be notified should any question of misbranding arise in the future, and that it would do its utmost to comply with the views of the Administration.

10. Defendants admit the allegations contained in paragraph 10 of the complaint, except that Defendants allege that the partnership of Mytinger

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& Casselberry, Lee S. Mytinger, William S. Casselberry and Carl F. Rehnborg were the persons indicted, and defendants deny that both interstate shipments were made in January, 1947. Defendants have no information sufficient to form a belief as to whether Plaintiff did in fact withdraw certain literature which was the basis for said indictment from circulation fourteen months prior to the date the indictment was returned, or as to whether the edition of the booklet "How to Get Well and Stay Well," one of the bases of the indictment, was withdrawn from circulation five months prior to said date, but allege that they had probable cause to believe that the present revision of the labeling that is in use is equally offensive to the law as that involved in the criminal action.

11. Answering paragraph 11, Defendants admit the allegations contained in the first paragraph, except that they allege that the libel action at Belleville, New Jersey was brought on October 6, 1948, the action at New York City on October 19, 1948, the case at Hastings, Nebraska, December 1, 1948.

Defendants deny that there was no necessity for the institution of the various libels in the several states, further deny that the libel proceedings harass the plaintiff, and deny that actions other than the ten listed have been threatened.

12. Defendants have no information sufficient to form a belief as to the truth of the allegations of paragraph 12, except that Defendants aver that

Plaintiff, under 21 U. S. C. 334 can consolidate the various libel actions for trial and Defendants deny that Plaintiff's business will be almost completely destroyed or irreparably damaged before a hearing and adjudication can be had on the merits in said consolidated action.

13. Defendants admit that a number of state embargoes were placed on the plaintiff's products at the request of agents of the Food and Drug Administration, but deny that such embargoes are unwarranted and deliberately calculated to interfere with and ultimately destroy plaintiff's business and good will.

14. Defendants deny the allegations of paragraph 14 of the complaint, except that defendants have no information sufficient to form a belief as to the truth of the allegation regarding the retail value of the seized products or regarding the number of Plaintiff's sub-distributors, or whether the products under seizure are subject to deterioration and loss of potency by the passage of time or whether they will be unsaleable and of no value to Plaintiff even if such libel actions are determined in its favor.

Defendants admit that the products under seizure are not available for sale while said labels are pending.

15. Defendants deny that the Plaintiff is being harassed, its business and good will destroyed and its property depreciated by reason of the

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several libels instituted and seizures made thereunder. Defendants aver that the institution of the several libel actions and the seizures effected thereunder were made in conformity with Section 304 (a) of the Federal Food, Drug, and Cosmetic Act [21 U. S. C. 334 (a)].

16. Defendants deny the allegations of paragraph 16 of the complaint.

Defendants admit that there is no provision of law permitting reimbursement of Plaintiff for any loss or damage incurred as a result of the institution of said libel actions. Defendants aver that, under 21 U. S. C. 334, Plaintiff may consolidate all of the libel actions in one district and have an adjudication on the merits of all such actions at one trial.

17. Defendants admit the allegations of paragraph 17, except that Defendants allege that the Federal Security Administrator, in accordance with 21 U. S. C. 334 (a), has determined that there is probable cause to believe that the labeling of the product "Nutrilite Food Supplement" is misleading in a material respect to the injury or damage of the purchaser or consumer.

18. Answering paragraph 18, Defendants admit the allegations of subparagraph A.

Defendants deny the allegations of subparagraph B.

Defendants deny the allegations of subparagraph C.

Defendants deny the allegations of subparagraph D.

19. Answering paragraph 19, Defendants deny the allegations contained therein except that Defendants aver that Section 304 of the Act [21 U. S. C. 334 (a)] does not contemplate consolidation for trial in the home district of the claimant.

20. Defendants deny each and every allegation of paragraph 20.

21. Defendants deny each and every allegation of paragraph 21.

22. Defendants deny each and every allegation of paragraph 22.

23. Defendants deny each and every allegation of paragraph 23.

24. Defendants deny each and every allegation of paragraph 24.

25. Defendants deny each and every allegation of paragraph 25.

26. Defendants deny each and every allegation of paragraph 26.

Defendants hereby deny each and every allegation contained in paragraphs 1–26 of the complaint not hereinbefore specifically admitted.

Fourth Defense

Defendants aver that every action they have taken has been in strict conformance with the terms of the Federal Food, Drug, and Cosmetic Act.

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Wherefore, Defendants pray judgment that the complaint be dismissed.

ALEXANDER M. CAMPBELL,
Assistant Attorney General.
VINCENT A. KLEINFELD,
Attorney, Department of Justice.

Dated: April 20, 1949.

In the United States District Court for the District of Columbia

Civil Action No. 5208–48

MYTINGER AND CASSELBERRY, INC., A CALIFORNIA CORPORATION, PLAINTIFF

v.

OSCAR R. EWING, ET AL., DEFENDANTS

TRANSCRIPT OF PRETRIAL PROCEEDINGS

Certified Record of Official Court Reporter

Proceedings Before Judge Tamm. Wednesday, April 13, 1949. Pages 1–52. Prepared for Mr. Kleinfeld.

United States District Court for the District of Columbia

Civil Action No. 5208–48

MYTINGER AND CASSELBERRY, INC., A CALIFORNIA CORPORATION, PLAINTIFF

v.

OSCAR R. EWING, ET AL., DEFENDANTS

WASHINGTON, D. C.,
Wednesday, April 13, 1949.

The above-entitled matter came on for hearing in the chambers of Judge Edward A. Tamm at 10 o'clock a. m., on Wednesday, April 13, 1949, in the Courthouse, at Washington, D. C.

Before: Honorable Edward A. Tamm, District Judge of the United States District Court for the District of Columbia.

Appearances: Charles S. Rhyne, Esquire, and Lester L. Lev, Esquire, on behalf of the plaintiff; and Vincent A. Kleinfeld, Esquire, and William W. Goodrich, Esquire, in behalf of the defendants.

PROCEEDINGS

The COURT. Mr. Reporter, will you first take the names of counsel so that we may have a record of who is present and who they represent, please?

Mr. GOODRICH. My name is William W. Goodrich. I am an attorney for the Federal Security Agency, Food and Drug agency.

Mr. KLEINFELD. I am Vincent A. Kleinfeld of the Department of Justice, representing the defendants.

Mr. LEV. I am Lester L. Lev, one of counsel for the plaintiff.

Mr. RHYNE. Charles S. Rhyne also representing the plaintiff.

Mr. GOODRICH. I have a young lady from my office. She would like to sit in, too.

The COURT. The purpose of this conference this morning is to outline to counsel certain considerations that the Court believed should be emphasized in order that the attorneys would know the factors that the Court considered in reaching its determination at the hearing on Wednesday of last week.

Judge Goldsborough had requested that we have a further hearing on Monday of the current week, basically to go over with you certain factors that we considered all counsel should know, in order that no one would be at a disadvantage in the subsequent hearing of the case.

Unfortunately, Judge Goldsborough is ill and it was necessary to postpone the Monday hearing.

Consequently, I am going to undertake to tell you the position of the Court in this case and try to get some general outline in the nature of a pretrial proceeding which will clarify for counsel and expedite for the Court the hearing set for April 25th.

First of all, Judge Goldsborough wanted counsel advised that the Three-Judge Court in issuing the restraining order of last week did not act solely upon the constitutional question involved but attempted to consider the complaint and the answer upon the basis of the merits of the cause.

The Court consequently issued a restraining order, rather than a temporary or permanent injunction, in a desire to continue the status quo and notify counsel that the Three-Judge Court would

go beyond the constitutional question and consider the case on its merits, so that everyone would come to court with a full understanding of what the Court was going to consider.

The Court further felt that Judge Pine's previous ruling in connection with the previous complaint, the motion to dismiss, and so on, was not the law of the case or binding on the Court, in so far as the decision of the Three-Judge Court was concerned. As a matter of fact, it felt in issuing the restraining order an inclination, at least, to overrule certain of Judge Pine's findings.

It was with this general background in mind that the Court issued what appears to be an additional restraining order, rather than a temporary injunction, to put counsel on notice that that Court desired to hear the case upon its merits by the introduction of testimony to support the contention of the plaintiff that its Exhibit A, and in referring to Exhibit A, I don't know whether I am referring to the exhibit by the plaintiff or by the defendant, and to permit the Government to introduce such testimony as would support its contention that the exhibit is materially misleading, and so on.

With that background, the Court has instructed me to hold a pretrail conference for the purpose of, first, determining a satisfactory date to counsel for both sides upon which a hearing on the merits can be held.

And secondly, to effect some agreement as to the number of witnesses that will be called, particularly if the plaintiff or defendant consider it necessary to call expert witnesses in support of their positions.

Third, to obtain stipuluations as to the admissibility of evidence without formal proof, particularly documentary evidence, and to simplify the issues to a point, insofar as is practicable, where we will know just what we are going to meet and meet it head-on.

The first matter then is the matter of the date of the trial. The Court has presently continued the case to April 25th. We felt within the Court that counsel on one or both sides might desire a continuance after that, a week or two weeks, or some reasonable period, particularly if there is a question as to the availability of witnesses.

The Court was inclined in the beginning almost to encourage any reasonable request for continuance, but at the present time the court commitments are such that if April 25th is entirely agreeable to both sides, we can hear the case on April 25th.

As I say, in determining and fixing the date, I want you to consider it and I am asking you to assist. I don't know whether from the nature of this exhibit, which seems to be about all we have in the case, whether you are going to offer expert testimony.

Mr. RHYNE. Frankly, I don't know what the expert testimony could be about, except as to the phraseology of the book and so on.

The COURT. It is the function of the Court to hear the case, not to try it. That is your problem, rather than ours, to consider what you have in the way of proof, availability of witnesses, and so on.

I would like to hear from you as to the suggested date for trial.

Mr. KLEINFELD. May I address the Court first?

The COURT. Certainly.

Mr. KLEINFELD. The Government would like for the record at this time, as I will on the date of trial, to object, one, to the jurisdiction of the Court on the ground that what the Court is determining shall be tried is beyond the jurisdiction of this Court.

Two, that the Government objects to the propriety of what is going to be tried. It is the Government's position, one, that this Court is a particular Three-Judge Statutory Court set up for one particular purpose, to determine the constitutionality of the seizure provision of the Federal tionality of the ceizure provision of the Federal Food, Drug, and Cosmetic Act, and for no other purpose.

The Government's second position is that every issue in this case, other than the constitutional question was determined and argued at great length before this District Court, before Mr. Jus-

tice Pine, on two different occasions, and that in dismissing the complaint this District Court determined every single issue, except the constitutionality of the seizure provision of the Federal Food, Drug, and Cosmetic Act.

It is our present position that Judge Pine gave plaintiff leave to amend for only one specific purpose, to allege the unconstitutionality of the seizure provision of the Federal Food, Drug, and Cosmetic Act, and that is the only issue which this Court has properly before it, or properly can determine.

It is the Government's further position that this Court is without jurisdiction to perform a function which the statute has specifically vested in the Federal Security Administrator, to wit, to determine whether there is probable cause to believe that the labeling involved in this case is materially misleading to the injury or damage of the purchaser or consumer.

To that extent, the Government will proceed in a trial on the merits as directed by this Three-Judge Court, only with the premise that it is objecting to the trial on the ground that the Court is without jurisdiction, and it also is objecting to the propriety of this Court substituting itself for the Federal Security Administrator.

Do you have anything else to add?

We also state to the Court that this Court on April 6, 1949, apparently granted, one, a further temporary restraining order, and two, a prelimi-

nary injunction. Since the order of this Court provides, in addition to the granting of the temporary restraining order, that the defendants are enjoined temporarily pending final judgment here from continuing further prosecution of seizure actions or the institution of further seizure actions, we therefore are of the view that this Court did grant a temporary restraining order and a preliminary injunction, and that by the Federal Rules of Civil Procedure, Rule 52, findings of fact were required before such an order could be issued, and we therefore request that this Court vacate that temporary injunction.

With respect to the first portion of the order of April 6 with respect to the temporary restraining order, we urge that 28 U. S. C. 2282, designating the jurisdiction of the Three-Judge Statutory Court, requires that statutory findings be made even with respect to a temporary restraining order, and that such finding has not been made, and we ask the temporary restraining order be vacated.

We object to both the temporary restraining order and the preliminary injunction on the ground that the respective statutes have not been observed.

Mr. RHYNE. If the Court please, first of all, addressing myself to the date of trial, I would like to say that it is the position of the plaintiff that on a matter as important as the constitutional issue presented in this case that the Court is en-

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titled to be fully informed by the trial, in which testimony is presented in support of the allegations of the complaint, before it is required to pass upon that important issue, because our attack on the statute is as applied to the plaintiff.

Therefore, the Court is entitled to have the facts before it showing how this statute is applied to the plaintiff unless the defendant is willing to admit all the facts in the complaint. Of course, the defendant has not yet filed its answer so we don't know just what facts the defendant will admit.

But the defendant did in support of its motion to dismiss go beyond the usual motion and file affidavits which created a conflict of fact for the Court, and thereby making it necessary for the Court to either ignore those affidavits filed by the defendant or pass upon the issue of fact, so that the defendant itself has forced the Court to hear the merits in this case, aside from the question of the constitutional issue.

On the other suggestion made by Mr. Kleinfeld, I do not suppose it is incumbent on us to say anything at the present time.

The COURT. It is not necessary for you to defend the Court's action.

Mr. RHYNE. So I will therefore address myself simply to the question of date.

The COURT. One moment. I do want to put on the record the fact that the Court in reaching its determination considered that Judge Pine's ac-

tion resulted in the filing of an amended complaint, which set forth all of the issues in the proceeding, and the Three-Judge Court consequently considered the amended complaint as the basis upon which it was required to take action. It considered the amended complaint, which raised certain factual issues, and so on, and the action of the Three-Judge Court was predicated upon the amended complaint, which, as I have indicated, the Court considered to embrace all the issues raised by the entire pleading of the amended complaint. I failed to make that clear in my statement that the Court considered all the factors, but it was predicated upon the phraseology of the amended complaint.

Mr. KLEINFELD. May I speak another minute?

The COURT. Yes.

Mr. KLEINFELD. If Your Honor please, as far as the contention that the Government raised some issues of fact by affidavit, I believe it is up to the Court to consider the affidavits or not, as the Court chooses. They do not raise any question of fact. The Court on motion to dismiss may ignore the affidavits, it may do so, and if it wishes to use them, it may. That is for the Court to determine.

As far as the allegations in the amended complaint, other than the allegation of constitutionality, it is the Government's position that those allegations were put in improperly and without authority.

This Court through Judge Pine gave the plaintiff leave to amend its complaint, to allege one thing and one thing only, and that was all that was left after the original complaint was dismissed, and that was the alleged unconstitutionality. All the other allegations of the amended complaint are irrelevant and improper.

The Government did not have time to move to strike them, but if you permit us, we hereby urge every allegation of the amended complaint, other than any allegation specifying an attack on unconstitutionality, were improperly put in the amended complaint. Notwithstanding what Judge Pine permitted them to do, every allegation, other than unconstitutionality, is improper and should be stricken, and it is not properly before this Court.

I urge that this Court, after determining that some trial on the merits be had, that this Court should determine that there is no substantial question of constitutionality raised, and that this Court should .determine that before reaching the other issue.

There is legal authority for that, and I will be glad to give the Judge citations.

In my opinion of the case, it is that the case should be remanded to Judge Pine of the District Court for trial, whatever trial there can be on the merits. I urge the only question really before this Court is the alleged unconstitutionality, and

not a trial on the merits which this Court has directed.

There has been no allegation by Plaintiff in the complaint or amended complaint for any desire for a trial on the merits, and the Government cannot see what such trial can be, that no issues have been framed in the case with respect to any trial on the merits, and a trial on the merits is beyond the purview of the pleadings in this case, as well as beyond the jurisdiction of the Court.

The case I would like to cite to Your Honor is Jamison against Morgenthau, Secretary of the Treasury, 307 U. S. 171, which, I believe, indicates that this Court should either determine the constitutionality of the question involved here, or remand the case to a one-Judge District Court for a determination.

I also respectfully submit to the Court, if it is considering only the amended complaint, that Exhibit A was not attached to the amended complaint, and that therefore it is not properly before the Court. Since Your Honor said it is considering only the amended complaint, I wish to bring to the attention of this Court that Exhibit A was not the advertising or labeling material upon the basis of which the Federal Security Administrator, in reaching and performing the function vested in him by law, determined whether there was probably cause to believe that the alleged misbranding was materially mislead-

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ing to the injury or damage of the purchaser or consumer. Exhibit A was not before the Federal Security Administrator.

It was merely inserted in the original complaint by the plaintiff and has no bearing on the case whatsoever, and we object to having any trial with respect to it.

Mr. RHYNE. First of all, as to the date, since it was mentioned first, I would like to discuss that for just a moment, if I may.

Since my clients are in California, it will be necessary for us to bring such witnesses as we have from California, and I believe we must take certain depositions out there, and I think the 25th is a little too early. I say that for this reason: I believe that the more time the Court can give us to prepare, the more time I can save the Court at the trial. We can be better prepared and make our case much more concise and save the time of everyone concerned.

Also, I believe it is the intention of the Government to object to my subpoenas, which I must issue to them, to find out what their contentions are. They have not filed any answer to date, and it will take some time to get objections to the subpoenas passed upon.

I believe it is your intention to object, isn't it, Mr. Kleinfeld?

Mr. KLEINFELD. I cannot say until I know what subpoenas are issued and to whom they are addressed.

The COURT. I do not think that there will be any difficulty there. You can take a deposition from Government counsel to get the names of his witnesses. We will come to that issue when we reach it.

Mr. RHYNE. I would suggest that probably May 9th, which would be an additional two weeks, would be a more reasonable date in view of the nature of the case, and the nature and extent of the preparations we must make for trial.

I anticipate bringing people from California and of taking the depositions of people out there that we cannot get to come here. I would like to save the Court as much time as possible at the trial, and it has been my experience that if you prepare yourself thoroughly, you can do that, and I think I need that much time, and it would be in the interest of justice in giving it to us.

The COURT. You propose May 9th?

Mr. RHYNE. Yes.

The COURT. What is the Government's position?

Mr. KLEINFELD. The Government objects most earnestly to any further delay. These proceedings have been pending since early January, back and forth, in the District Court before Judge Pine, and temporary restraining orders have been granted, the Government has on several occasions consented to informal stays, over a period of three months, I think.

This product has been sold and is continuing to be sold, and we think that in view of the fact that in the opinion of the Government the public is being defrauded to the extent of a half million dollars a month, that a trial should be had at the earliest possible moment.

We urge that since this Court on April 6th granted a temporary restraining order and the preliminary injunction, the plaintiff has had plenty of time, in addition to the last few months, to present its testimony. Since it has obtained what it has been seeking all along, some sort of trial, it has had plenty of time to prepare its evidence to submit it to the Court, and we urge that the statute under which this Court is proceeding provides clearly that a trial should be had as early as possible or practicable.

In view of the fact that it is the opinion of the Government Food and Drug Administrator in charge of the administration of the law that this product is grossly and materially misleading and is defrauding consumers to the extent of a half million dollars a month, we think that the trial ought to be not later than April 25th.

Mr. RHYNE. May I say one word more as to his statement about consenting to delays? The only time the Government has consented to anything is when Judge Pine dismissed their first motion, and he said he would issue an injunction unless they did consent, and so Mr. Kleinfeld consented

then, but it was never voluntary consent, and I think the record should be clear on that.

I would like to say also that Mr. Kleinfeld used the word "defrauded." There is no question of fraud in this case, and the only charge the Government made is that our label or advertising is misleading in a material respect to the injury of the purchaser or consumer. So I think that there can be no issue of fraud before the Court, and I think I should object to the statements that seem to imply that there is a question of fraud because there is not.

Mr. KLEINFELD. In any event, it has been over three months.

The COURT. Yes; I recognize that fact, but also the other members of the Court commented on the fact that the Government, by your statement to the Court, had had since 1945 in which to move in this case. So that the Government has consumed a period of some four years in initiating its action. I do not think that two weeks additional will make any difference.

We will set the case down for hearing on May 9th at 10 a. m.

Now, the next question is the one of witnesses, particularly as to the limitation of expert witnesses. Is there any occasion or necessity for using expert witnesses? What do you contemplate in that regard?

Mr. RHYNE. Your Honor, we will not present any expert witnesses unless necessary to answer

the Government on some matter that I cannot imagine at the present time to be raised by any expert that they present. For example, I believe that the Government concedes that our product is harmless. We have doctors who we can produce who will testify that our product is harmless, and they prescribe it for their patients, and it is one of the very best vitamin products that there is.

If the Government will admit, and we don't have their answer and we don't know what they admit, but if they will admit that these facts are true, it will be unnecessary for us to prove it. The issue will come into the case if brought in by them.

The COURT. Do you contemplate any medical testimony? Are you going to challenge the product itself? There is no question of expert testimony in so far as the Government is concerned. The question is whether this labeling is misleading; is that correct?

Mr. KLEINFELD. Well, that is the question that the Court says is the question.

The COURT. Yes. So that you contemplate no expert witnesses in the sense we use the term, do you?

Mr. KLEINFELD. I doubt it very much, Your Honor. It will depend on what they put on.

The COURT. They have indicated they won't use them unless the Government does, and the record indicates that there is no apparent requirement for expert witnesses.

The issue before the Court fundamentally, in so far as the testimony is concerned, will be the question of misleading labeling in the use of the book How to Get Well and Stay Well. Is that the title of the predecessor document? It did bear the same title?

Mr. RHYNE. Yes.

The COURT. Is the Court's understanding correct that that is not the document upon which the Government has predicated its action, referring to the present Exhibit A in the pleading?

Mr. RHYNE. Could I explain that in a word? Last September when the Government made its first move against us, the thing that they pointed out in the then current edition of How to Get Well and Stay Well was certain testimonials sent by people saying that Nutrilite helped them in various ways, and when they pointed it out to us, we withdrew it from the book, and this book is the book that the Government has libeled, except for the testimonials, and they are out.

The COURT. But that is not the document upon which the Government predicates its action? That is correct?

Mr. RHYNE. Could I say one other word? The first three libel actions seized the first book, and all the others have seized this one, so it is the book that the Government is proceeding against.

Mr. KLEINFELD. That is just not so. The Administrator made three separate determinations of probable cause upon the basis of three

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different pamphlets entitled How to Get Well and Stay Well. Since the Government made the seizure actions the pamphlet has been changed from time to time and that is one reason we haven't been able to get these people since 1945.

This last Exhibit A made further changes subsequent to the changes made in each of these three pamphlets upon the basis of which the Federal Security Administrator made his determination. This Exhibit A in its present form was not before the Federal Security Administrator when he made the determination of probable cause under the Act.

The COURT. Is it possible for you to identify by date or copyright date or other description the several booklets entitled "How to Get Well and Stay Well"?

What I am interested in next is a stipulation that the Court will receive, without formal proof, and so on, the pamphlet entitled How to Get Well and Stay Well. I would like to have that identified, particularly if there are three separate pamphlets, each the basis of a separate libel action. I think the Court should have each succeeding pamphlet before it.

Mr. KLEINFELD. But I urge these pamphlets are not before this Court and are not part of the case. They haven't been set forth in the complaint or in the amended complaint. They are not part of it.

Mr. LEV. May I say a word? I grew up with this case. The customer book, which was the subject of the first three seizures, was that book, except that it contained 58 pages, and the first three seizures took the pages from 37 to 58, inclusive, and we thought that is what the Government objected to, and we sent out orders to everybody to tear out those last several pages, from 37 to 58, inclusive.

Those are the ones which are Exhibit A, attached to the libel, as it is the claim of misbranding in the first Belleville, New Jersey, case, and the Buffalo case, and New York City.

We had all the distributors tear out these pages, and in the interim, before we could print and distribute new pages to take the place of those taken out, one or two, I think, maybe three more seizures took place, and they got the booklet which ended on page 37 and without the last pages.

Then we got out substitute pages, only 7 pages to take the place of the 20 torn out, and we now have a 42-page booklet, and that 42-page booklet, which had been revised in October, was used from October 1948 up to the present time, and is still in use, and that last booklet, which is booklet number 3, which has substituted pages in it, has been the subject of the last several seizures.

That is the only book we have been used since October 1948. I think October 1948 is the date.

Mr. RHYNE. We take the position, Your Honor, that in order to show our utmost good faith that

we should not use anything that the Government attacked, that was the reason these pages were taken out.

Since then, in Dr. Dunbar's affidavit and statement of counsel, they say this booklet which you have before you there is the same in substance as the other, and they level the same attack against it.

That is your position?

Mr. KLEINFELD. The entire booklet is entirely materially false and misleading.

Mr. RHYNE. This new book of 42 pages, which you have before you, is Exhibit A, and has been an exhibit in the libel actions in Spokane, Seattle, Clarkfield, and St. Petersburg, and the copy of the book is Exhibit B in the Chicago case.

Mr. LEV. These exhibits were mimeographed and these list Exhibit A.

The COURT. Is it agreeable to counsel on both sides that the pretrial record show and it is stipulated that three separate or successive issues of the pamphlet or booklet How To Get Well and Stay Well will be admitted in evidence, without formal proof as to the publication and the printing, and so on?

Is that agreeable to the Government? You are already on record as protesting the Court's consideration and so on.

Mr. KLEINFELD. Yes. We would like to check on the last three books, Your Honor.

The COURT. Let me revised the stipulation to provide that there will be received, without formal proof, such copies of the pamphlet How to Get Well and Stay Well as plaintiff and defendant desires to bring to the Court's attention. Let us not confine it to three or any particular number, and if the Government has in one locality no copy of the pamphlet, they would not object within the three specified, so that there will be no necessity of formal proof with the introduction of the pamphlet. Nobody is restricted to three or four, or copies on certain pages.

Mr. KLEINFELD. I would rather put it this way: The Federal Security Administrator made findings on three pamphlets, and we have copies of those, and everybody can see them, and if the Court desires, we will bring those three pamphlets before the Court.

The COURT. There is no question it will be more than three?

Mr. KLEINFELD. No; we will be glad to bring them and submit them to the Court.

The COURT. The record will indicate that the Court will receive three separate or successive issues of the pamphlet How to Get Well and Stay Well.

Mr. RHYNE. Including one of these as Exhibit A because that is one of the ones.

Mr. KLEINFELD. We will check our third pamphlet with Exhibit A.

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Mr. RHYNE. You will find it is.

Mr. KLEINFELD. If it is, that will be Exhibit A.

The COURT. Very well.

Mr. RHYNE. But in any event, we will introduce Exhibit A.

Mr. KLEINFELD. We will object to it unless it is Exhibit A.

The COURT. Of course, in these matters there is reserved to counsel the right to object on grounds of materiality to any pamphlet or any other documentary evidence.

The purpose of the stipulation is to waive formal proof of the publication and identification of the document, and preserving objections as to materiality and competency, or any other objection, that goes to the probative value of the document.

Are there any other exhibits in the form of documents, first as to the plaintiff, on which we can agree may be admitted without formal proof? Do you have any other documentary evidence you desire to tender?

Mr. RHYNE. Yes; I have certain extracts from medical journals and other publications, many of them official publications of the Government, which I would like to introduce at the proper time. I don't have them with me. They are being prepared in California.

The COURT. For what purpose?

Mr. RHYNE. To meet any statement that the Government might make as to, for example, in the

book that preceded this one, where you have those letters in there from various people, and they say that this product proved beneficial to them in the treatment of a certain thing. And if the Government claims that that letter is all wrong, that our product could not be beneficial for that particular thing, I have statements in medical journals which I would want to put into show that the Government's opinion is wrong.

I will use it in rebuttal entirely, you see.

The COURT. This will be entirely in rebuttal?

Mr. RHYNE. Yes; Your Honor.

Mr. KLEINFELD. We would object on a number of grounds to putting in such evidence. One, it is hearsay, anyway, and it is not proper.

Two, it has nothing to do with the issues in this case.

The COURT. I think the Court in an informal discussion of this kind is not required to pass upon materiality. Fundamentally, I do not see the materiality of your documents to the issue of the misleading charge. However, I would suggest in the interest of meeting all issues, that you furnish to Government counsel a list of the article from medical journals and publications, and so on, which you have in mind, in order that, if the progress of the trial develops the necessity for your tendering such documents, and so on, that Government counsel will have a complete chance to review them and will be in a position, without

delay, to enter objection on the ground of materiality, competency, or anything else.

Mr. RHYNE. Yes; but I would like to say this: Under the so-called findings and conclusions made by the Administrator of the Federal Security Agency, he keeps repeating that the consensus of medical opinion is this and that, and that is what I wanted to use the documents for, to show that is not the consensus of medical opinion.

I am willing to meet the other objections at the time.

The COURT. The record will indicate your position, but with documents of this kind it will facilitate the Court's action if Government counsel has been furnished with the citations, so that they have ample opportunity to check them to determine what objections they desire to make, and so on, so that there will be no question of delay by reading the document or checking the identity of the author.

Mr. KLEINFELD. I repeat, but we do object to any document which is of that nature.

The COURT. Your objection goes fundamentally to the trial of the case.

Mr. RHYNE. It is not in issue.

The COURT. But the objection can only be made at the trial. I cannot pass on the objection here. But in order to avoid delay, you will have an opportunity to review all the documents which he may use or tender to the Court as authority, prior to the trial.

What other documentation, if any, do you intend to tender?

Mr. RHYNE. None.

The COURT. You better consult counsel.

Mr. RHYNE. Well, Mr. Lev calls my attention to the fact that we do not have an answer, and we don't know what they might admit as to the fact that we are incorporated, and so on.

I suppose the Government will admit this so that we do not have to prove our incorporation. Other than that we do not contemplate any other documentation.

The COURT. Very well. Does the Government have any formal exhibits or documents?

Mr. KLEINFELD. May I ask a question as to whether the plaintiff is going to put in evidence as to the truth or falsity of the allegations, the statements in each of the three pamphlets, on the basis of which the Federal Security Administrator made his conclusion and finding? Is the plaintiff going to put in any evidence as to the truth or falsity of those three pamphlets?

The COURT. The truth or falsity? Can you go to any section?

Mr. KLEINFELD. No; Your Honor. With reference to this whole pamphlet; the Administrator made it on the basis of the whole pamphlet.

The COURT. In its entirety?

Mr. KLEINFELD. In its entirety. I am trying to find out if they are going to put in any evi-

dence to establish the truth or falsity of the three pamphlets.

Mr. RHYNE. I might say, first of all, not knowing which part of the pamphlets they are attacking, we are in a rather unusual position.

I am inclined at the present time to simply say: Under the circumstances or conditions in which the pamphlets were prepared, to let the pamphlets speak for themselves. If the Government points out something that they claim is untrue, then we will meet that.

I think the pamphlet is in writing, and it is unambiguous, and it would, as a matter of law, speak for itself.

Mr. KLEINFELD. Well, that brings a fairly important question which has not been decided. The Government has an understanding, since the plaintiff is the plaintiff in this action, the burden of the trial is on them to prove their case.

The COURT. The plaintiff is the moving party, and the burden of proof is on the party proceeding, and is on the plaintiff not only to establish a case but to establish a prima facie case before resting.

The Three-Judge Court, of course, sits both as a finder of fact and the finder of law and upon admission of the pamphlet, with the collateral proof, and so on. The Court is faced squarely with the issue of finding, as a mater of fact, whether the pamphlet is misleading, and so on.

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You contemplate on this point that counsel for the Government has raised, you contemplate no testimony as to the proof of the statement that you make? The pamphlet speaks for itself?

Mr. RHYNE. May I say: We take the position that the pamphlet is unambiguous, and we cannot find anything wrong with it whatever, and that the pamphlet itself makes out a prima facie case.

We will explain how it was written and the background of our business as related to the pamphlet, and its use in the sale of our product, and I think we have made out a prima facie case then.

If the Government finds any objection, it is up to it to make them out. I do not see how he can disprove or negative it.

Mr. KLEINFELD. All I can say about that: That is your problem. You have the burden of proof, I assume.

As far as the Government is concerned, I think to simplify the trial, we are going to offer, of course, copies of the finding of fact and the determination of probable cause upon the basis of which the Administrator made his final determination.

The COURT. Now, just one minute. Does plaintiff's counsel stipulate that the Court may receive those findings of fact and conclusion from the Federal Security Administrator, without formal proof of all the people who participated in the finding, and so on?

Mr. RHYNE. If Your Honor please, on that question, of course, we will object to their admissibility on the ground that they are hearsay, and since we had no opportunity to appear to find out who participated in the whole proceeding, that they are not admissible. I say, in any event: I would like to say so far as the stipulation is concerned, that they are authentic but not as to their admissibility. In other words, that the paper that they gave us was, in fact, signed by the Administrator, and that is about as far as I can go.

I would like to go as far as we can in the interest of saving time at the trial, but I do not see how we can go further than that in view of the fact that we were not there, and we do not know anything other than that they now say this was signed by the Administrator. As a matter of fact, he didn't even date it when he signed it. So we are in a rather peculiar position today, but I would not contend that is not his signature and that he did not sign it.

The COURT. I think we will take a ten-minute recess.

(Thereupon a short recess was had.)

The COURT. We are now talking about the hearsay status of the Government report.

Mr. KLEINFELD. I am puzzled because the entire case revolves around the finding made by the Administrator, and they are in the record and submitted to the District Court, and I didn't think

counsel would object to the fact that they were made.

Mr. RHYNE. I am not objecting to the fact that they were made, but I am objecting to the contents, that we were not there, and had no opportunity to participate, and any facts therein are hearsay.

Mr. KLEINFELD. That goes to the ultimate question, after all, and these are the words of the statute. I think you are attacking the law again. I don't think you will dispute that the Administrator under the law, without hearing, under the law may make this finding of probable cause, and certified copies were filed with the Court.

The COURT. Is the Government position that they are admissible as official Government documents? Is that the position upon which you tender them, that they have the same official standing as any other official Government document?

Mr. KLEINFELD. Yes; and they were already part of the case and not objected to by plaintiff's counsel.

The COURT. I think you are on notice that counsel intends to make objection to their admissibility, so that you are confronted with the problem of proving their contents by the persons who made the reports, and so on, in the event the objection to the introduction is sustained. I cannot speak for the Court, but I want you to be on notice that the Plaintiff does take this position, and that you may be confronted with the prob-

lem from an evidentiary viewpoint of establishing by witnesses the conclusions and the findings, and so on, that are made in behalf of the Federal Security Administrator.

Let me ask about any other documents. Do you have anything further in the form of documentary evidence?

Mr. KLEINFELD. Only one thing, Your Honor. The plaintiff's amended complaint refers to an exchange of correspondence on two different occasions between counsel for the plaintiff and the Federal Security Administrator. I would like to stipulate that the letters transmitted by counsel for the plaintiff, and the reply, his reply from the Federal Security Administrator, are offered and admitted in evidence.

The COURT. Without formal proof?

Mr. RHYNE. Yes. I was really going to offer those myself.

The COURT. Is it stipulated that there will be admitted in evidence, without formal proof correspondence exchanged between the Federal Security Administrator and the plaintiff?

Mr. KLEINFELD. I might particularize those, the letters I have in mind.

The COURT. Very well.

Mr. KLEINFELD. His letter dated January 28, 1949, addressed by Mr. Rhyne, counsel for the plaintiff, to the Honorable Oscar R. Ewing, Administrator of the Federal Security Agency. The second document is a reply to the letter of

January 28, 1949, the reply being dated February 11, 1949, and addressed to Mr. Rhyne and signed by J. Donald Kingsley, Acting Administrator of the Federal Security Agency.

And the third document is a letter dated February 18, 1949, addressed to Mr. J. Donald Kingsley, Acting Administrator of the Federal Security Agency, and signed by Mr. Charles S. Rhyne.

The fourth document is a letter dated March 2, 1949, replying to the aforesaid letter of February 18, 1949, addressed to Mr. Rhyne and signed by J. Donald Kingsley, Acting Administrator of the Federal Security Agency.

I would like counsel for the plaintiff——

The COURT (interposing). Is this separate from the letters?

Mr. KLEINFELD. Yes; this is separate.

Mr. RHYNE. I agree to that.

The COURT. It is stipulated that the letters enumerated by Government counsel, representing an exchange of correspondence between the Federal Security Administrator and the plaintiff corporation, and counsel, will be admitted in evidence without formal proof.

Mr. RHYNE. Yes.

The COURT. Now, Mr. Kleinfeld.

Mr. KLEINFELD. I would like to request counsel for the plaintiff to stipulate to the admission in evidence of a memo to all California distributors,

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dated March 17, 1949, entitled Your chance to help and distributed by the plaintiff in this case.

Mr. RHYNE. Neither Mr. Lev nor myself have ever seen it, but we will agree if it was, in fact, mailed out by our client, it may be admitted without formal proof.

The COURT. You will notify him that you have ascertained it was mailed out? Do you have the date and sufficient identifying data so that you can check with the corporation?

Mr. KLEINFELD. I want to have him make it more definite. That page was an insert in another document, and he may be able to check it up. It was an insert in the Nutrilite News, copy of March 17, 1949.

Mr. RHYNE. I will advise you on that.

Mr. KLEINFELD. Thank you.

The COURT. Now, what is your next?

Mr. KLEINFELD. I don't believe we have any further documents.

The COURT. I thought you had a blue one.

Mr. KLEINFELD. That is a report.

The COURT. You have no other documentary evidence on which we can avoid the formality of proof?

Mr. KLEINFELD. No.

The COURT. In the light of the Government's presentation, does the plaintiff have anything further to tender as documentary evidence?

Mr. RHYNE. Not at this time, Your Honor.

The COURT. Do you have any other matters upon which you desire to suggest stipulations?

Mr. RHYNE. Well, I would like to have the Government stipulate that they made these seizures at the time and the place indicated in the complaint. Of course, it might be when we receive their answer—they may not have known what I would request now—but it would not be necessary. I mean, they would admit that they made them at this time and place.

The COURT. Let us clarify the position of the Government with reference to the filing of an answer. What is your plan?

Mr. KLEINFELD. We haven't considered it very seriously, Your Honor.

Mr. GOODRICH. We are bound to file it within 60 days from the overruling of the motion to dismiss. That was done on April 6; is that correct?

I would just like to put in the answer as soon as possible; certainly in time for the trial.

Mr. KLEINFELD. As long as we are anxious to have a trial as soon as possible, we ought to put in the answer.

The COURT. Can you make any suggestion as to when you will file the answer so that plaintiff will know what concessions are made?

Mr. KLEINFELD. Not later than a week.

The COURT. A week from today?

Mr. KLEINFELD. Yes.

The COURT. Which would be the 20th, which gives counsel almost three weeks to prepare in the proceeding.

Mr. RHYNE. I would like to say that the rule provides that it is 10 days, rather than 60 days, from the overruling of the motion to dismiss. Sixty days to answer is what the Government has when we originally filed the complaint, but not when the motion to dismiss is overruled.

The COURT. Well, I think counsel is well within the rule. Since the pretrial conference has delayed this, the Court will consider that any difference of a few days is the result of the Court's action rather than any reluctance on the part of the Government to file an answer.

Mr. LEV. That is April 20th?

The COURT. April 20th.

Now, there was a question collaterally raised with the matter of the answer, that the Government would stipulate, or would it stipulate, as to the fact that the plaintiff was a corporation, duly incorporated, and so on.

Do you stipulate as to the corporate status, and so on, of the plaintiff?

Mr. KLEINFELD. Yes; I do.

The COURT. Very well.

Mr. RHYNE. Do you also stipulate as to the harmless character of our product? Or must we bring doctors and other experts here to prove that?

Mr. KLEINFELD. The Government never claimed that the product is directly toxic or dangerous. We think that there is an indirect danger to the consumer but no direct toxic or dangerous effect.

The COURT. As the result of following what the Government considers this misleading labeling?

Mr. KLEINFELD. The misleading labeling, and its concluding advice to use the product instead of seeing a doctor.

The COURT. I think the question of toxicity or nontoxicity of the product is not before the Court since the Government has predicated its action upon misleading labeling, identifying that as the booklet How to Get Well and Stay Well. I think testimony as to the toxic character of the product would be outside the pleading, and the Court would have to rule it is immaterial to the issue.

There are two questions before the Court, one, a question of fact as to whether the labeling is misleading, and two, the question of whether the action which the defendant in the case took violated the constitutional rights of the plaintiff.

That is all there is. I do not think that there is any question of harmlessness of the product. I do not think that enters into the issue at all.

Mr. RHYNE. Since they agree to that, I want to be sure they agree to it.

The COURT. As a matter of fact, Mr. Kleinfeld, at the previous argument, had stated that the Government never took the position that the ques-

tion of the toxic character of Nutrilite was in issue.

Now, is there any other point or item of evidence upon which plaintiff desires to stipulate, and upon which the Government will stipulate?

Mr. RHYNE. I think the rest of it we will just prove by evidence.

The COURT. Very well. What is the Government's position? Do you have anything else upon which you desire a stipulation?

Mr. KLEINFELD. I doubt it, Your Honor. Did you have anything, Mr. Goodrich?

No; we do not request any further stipulation, Your Honor.

The COURT. Is there any question as to the taking of depositions, and the identity of witnesses, and the exchange of information, which will materially facilitate the determination of the Court?

Mr. RHYNE. I might say that in my preparation I intend to take depositions of Dr. Dunbar and other officials of the Food and Drug Administration to find out—since we have no answer—just what their objections are to our How to Get Well and Stay Well. I want to develop those facts.

The COURT. Do you know the identity of the people from whom you are going to take depositions?

Mr. RHYNE. I do know I will ask Dr. Dunbar the names of the people who have worked on that particular question inside the Food and Drug Ad-

ministration at the Federal Security Agency, and I will then take the depositions of those people who know the facts.

The COURT. Are you going to take Dr. Dunbar's deposition in order to determine that fact?

Mr. RHYNE. Yes. I will ask him to give me the names of the people inside his organization who worked on this.

I will also ask him to produce documents as they relate to the issue here.

I may also take Mr. Larrick's deposition, and possibly Mr. Ewing's. Based on that information, I will have to determine what other depositions will be necessary. It may be in his answer.

The COURT. Is there any way we can facilitate the proceeding by the Federal Security Administrator furnishing to the plaintiff the names of those persons who would be furnished, in turn, by Dr. Dunbar? Can we save the time of one deposition, or do you want to take Dr. Dunbar's deposition, regardless?

Mr. RHYNE. I would like to have Dr. Dunbar's deposition because of his affidavit.

The COURT. Very well.

Mr. RHYNE. But I will be glad to have from Mr. Kleinfeld a list of the people who have worked on this misleading material, where we are charged by the Federal Security Agency, or the Food and Drug Administration, so we can determine whether I want their depositions in preparation for trial.

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Mr. KLEINFELD. First of all, I think such a list might entail a list of hundreds of people.

Two, it is our position that any attempt to get such information which counsel for plaintiff will attempt to get from Mr. Dunbar is irrelevant and immaterial and not part of the issues involved in this case.

The issue is not what Mr. Dunbar did or thought, but the issue is with respect to the misleading nature of the labeling here. What Mr. Dunbar did or thought seems to me, Your Honor, has nothing to do with the issue. We will object to it in the form of a deposition or otherwise. It has nothing to do with the case.

Mr. RHYNE. It is my position that this is a civil case, and just as in any other case either party is entitled to take the deposition of a party on the other side, or employees having knowledge of the facts, and we are entitled to take his deposition.

The COURT. You have that right. As a matter of fact, the person from whom you take the deposition does not have to have any knowledge in order to give you the right to take the deposition.

Under Rule 26 and 33 you have the right to take the deposition of a party to determine from them the identification of persons who have information.

Mr. RHYNE. That is right, Your Honor.

The COURT. Reading from Moore's Federal Practice under the new Federal rules, Volume 2,

at page 2620, with reference to Rule 33, it states: Disclosure of names of witnesses and addresses of witnesses may be obtained under Rule 33, which permits discovery as broad in scope as discovery by deposition, which is governed by Rule 26 (b), which expressly accords a right to the disclosure of the identity and location of persons having knowledge of relevant facts.

A party may also take the deposition of the attorney of the party answering the interrogatories.

You have that right. I would suggest, and it is a suggestion and in no way binding on counsel, that anything that you can do to facilitate the furnishing of names of persons—and we don't want hundreds of persons—but there must be three, four, or five key people in this thing that reached the determination, and I think that will assure us that we will proceed to trial on May 9th.

Mr. KLEINFELD. My only point is—I want to facilitate the trial as much as he does—but the Administrator has made the determination of probable cause under the statute, and he said so and it is on file with the Court, and the determination pursuant to the statute is made on certain factual findings, and these are before this Court together with the names of the persons, wherein the Administrator stated—

THE COURT. I do not think that there will be any difficulty on that. Both sides agree that the

sooner we can dispose of the matter the better.

I have pointed out previously in the interpretation of Rule 26 and 33 that you have the right to take the depositions, either to obtain evidentiary material or to obtain the source of evidentiary material.

Do you have any other questions as to deposition? Of course, in the taking of a deposition, counsel on both sides reserve the right to object to the deposition as a whole or to any part that is considered immaterial, and it is unnecessary for the Court to go into that.

Mr. RHYNE. Yes. I have another question. I will take certain depositions in Los Angeles, and I will give the notice required by the rules to Mr. Kleinfeld.

Mr. KLEINFELD. Did you say you intend to get depositions from people in California?

Mr. RHYNE. Yes. I intend to take the deposition of Mr. Born, head of your Los Angeles office, and such other persons out there as have knowledge of this controversy.

The COURT. That is one of the reasons I thought it would be desirable to grant a couple of weeks extension. I anticipated you would want to take the depositions of some California employees of the Federal Security Agency, of the Food and Drug section, and that Government counsel might want appropriate chance to participate, and so on.

Mr. RHYNE. Yes, sir.

The COURT. Even to the extent of someone going out there, where the plaintiff has an advantage in having counsel out there to take the deposition.

What does the Government want to do in the way of depositions?

Mr. KLEINFELD. I don't believe we have any depositions to offer or wish to take any.

The COURT. There is no problem upon which the Court can make any suggestion or formulate any practice of procedure that will facilitate the preparation of the case in any way?

Mr. KLEINFELD. I don't believe so, Your Honor. Thank you.

The COURT. Very well. What other factors can we clarify in this discussion that will afford both sides a full and complete understanding of the trial procedure, and so on, in order that no one is caught at any disadvantage? Is there anything further from the plaintiff?

Mr. RHYNE. The only suggestion I have is that when we receive their answer there may be some question I cannot anticipate at this time that may arise, and until I receive the answer I have nothing further, Your Honor.

The COURT. Anything further from the Government?

Mr. KLEINFELD. No, Your Honor.

The COURT. We have taken care of the matter of the answer. I have made a note of that.

The Court's order in this case, carrying as it did no heading, and which I have stated that the Court considered a restraining order, instead of the phraseology and enjoins, and so on, will expire by operation of the rules, how soon?

Mr. RHYNE. As I read Title 28, Section 2284, it would not expire until the determination of the cause by the Court.

The COURT. Under the rules, on a restraining order the Court is required to hold a hearing within ten days, unless the Court grants at its discretion a further extension of ten days.

Mr. RHYNE. Yes; but if you will look at that Section 2284 (c), it is provided there, and it is an exception to the ordinary rule, with respect to a restraining order that the Judge to whom the matter is first presented can enter a temporary restraining order that will last beyond ten days.

I want to see if I can find that.

The COURT. It is up on top there.

Well, I do not think we have to go into too much detail. What I was going to suggest: If there is any technicality that requires reissuance of the order, I thought it would be well for counsel to stipulate on both sides that the matter will remain in status quo until the trial on May 9th.

Mr. KLEINFELD. My only request is the request originally made, and the only reason we raised it is that we may consider taking some preliminary action on appeal. We believe that the temporary

restraining order, and that part that was a preliminary injunction, in either case, finding of fact would be required.

The COURT. The Court thought it would be taking unfair advantage of the Government in issuing a restraining order because counsel felt that Judge Pine's finding constituted an adjudication, other than a constitutional question, and issuing a temporary injunction, the Court felt would be taking unfair advantage of the Government, which came in on the assumption that the Court felt bound by Judge Pine's ruling, and it was for that reason that the order was drawn in the form it was.

The Court felt that the temporary restraining order would maintain the status quo and afford the Court an opportunity to explain to counsel its position with reference to matters which Government counsel, at least, and possibly plaintiff's counsel had considered res judicata.

The Court intended to issue an interlocutory order to afford both sides an opportunity to prepare and present evidence upon which the Court would then make a finding upon the basis of which an appeal could be taken by either or both parties.

Mr. RHYNE. May I read what I have reference to? This is Section 2284, Title 28, and it provides: In any such case, that is a Three-Judge case, in which application for interlocutory injunction is made, the District Judge to whom the

application is made may, at any time, grant a temporary restraining order to prevent irreparable damage.

The order, unless previously revoked by the District Judge, shall remain in force only until the hearing and determination by the full Court. It shall contain specific findings, based upon evidence submitted to such Judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

Your original order contained that.

The COURT. We are beyond that stage in the case. The Court held here we are beyond that part of the statute which involves the District Judge who issued his temporary order pending a hearing by the full Court.

Insofar as findings of fact are concerned, I have no personal reluctance to prepare findings of fact and conclusions of law, observing to say that we have in mind that Judge Goldsborough is sick, and he is in Maryland. I do not know whether it is feasible and I do not know whether it is practicable in any way to get him to concur or approve any such findings.

That is a practical problem that confronts me, and I say, dissolving any doubt in favor of affording you immediate action, you can see, whether I concur with you in that position, I do not see how with Judge Goldsborough sick we can get a finding in which he will concur.

Mr. RHYNE. May I suggest to the Court that if they desire you to make such findings, that counsel for the plaintiff will be happy to submit proposed findings for the assistance of the Court, and submit them to counsel for the defendant.

Mr. KLEINFELD. I don't think with respect to the restraining order or preliminary injunction of April 6, or even with respect to the original temporary restraining order which Your Honor granted, that the plaintiff has ever submitted evidence, according to the statute, to such Judge and identified by reference thereto, that specified irreparable damage would result if the order is not granted. I don't believe any such evidence has ever been submitted to this Court.

The COURT. The Court passed upon that matter on the occasion of our first conference when the motion for the temporary restraining order was filed, and the Court concluded upon the basis of the pleading presented to the Court in chambers that afternoon that the action of the defendant, if not restrained, would cause a dissolution of the plaintiff's sales organization, allegedly constituting some 5,000 employees, and would otherwise destroy, discredit and destroy, the plaintiff's business, and that irreparable harm would result thereto. I think the Court passed on that point with respect to the original temporary restraining order.

As I say, we took a rather technical step, a rather unusual one, in granting another restrain-

ing order because we did not want anyone to be at a disadvantage in feeling that we had ruled solely on the constitutional question.

I can say that the Court considered seriously the question of many other cases pending in the Federal Security Administration, which might be affected if the Court issued a temporary injunction on the ground that this section of the Act was unconstitutional. In other words, the Court tried to weigh all the factors involved and took the action which it felt would maintain the status quo only of the plaintiff and the defendant in this case, without working to the advantage or the disadvantage of the Government or any other persons operating under the provisions of the Federal Food, Drug, and Cosmetic Act by its action.

While we felt that the restraining order was a little unusual, we felt that by taking that step we would act only in this case, and the repercussions and the cross-currents would not reach to any other case that the Government or any other litigant had. That was the reason that the document was drawn as a restraining order, and one of the factors that the Court considered in going upon the basis of the whole record, rather than solely the constitutional question.

Mr. KLEINFELD. I would like to make my position a little clearer, and that is that it is honestly a matter of good conscience on my part. I have always honestly felt and still do that balancing the equities on both sides that the public was be-

ing damaged to the tune of a half million dollars a month.

Judge Pine at one time suggested an informal stay to be given, and I declined because I didn't want to be a party, in good conscience, and permit this product to be sold, in my opinion, in violation of law and to deprive the persons of a half million dollars a month, and keeping them away from doctors. I felt if any Court wishes, in its discretion and pursuant to law to give a restraining order, that was a matter for the Court.

But the Government, in view of the period which elapsed——

The COURT (interposing). 1945?

Mr. KLEINFELD. I think I told the Court, and that is before Your Honor, that the libel changed from time to time, and they kept away from us, and maybe we were not as diligent as we should be, but the Government moves slowly and it has been a tough case. It has not been this big business until recently. It was a much smaller business. But the Government felt it should not participate, unless required to do so, in any stipulations which would permit the further sale and distribution of this product again to the tune of half a million dollars a month, which the people who buy it cannot get back, and which, more important, pursuant to the pamphlet keeps them from seeing their doctors, and which may be to their irreparable damage in the way of health.

That is why we have been very reluctant to participate in the stipulations of the plaintiff.

That is why we ask Your Honor and this Court to make findings. We think it was important.

The COURT. I cannot speak for my senior associates on the Court. I will, however, accede to plaintiff's counsel's suggestion that you prepare as promptly as possible, within the next day or so, findings of fact and conclusions of law to be submitted to Mr. Kleinfeld for his observations, and I will then consult with the other members of the Court to see whether they consider it proper that such findings be made. That is as far as I can go in the matter.

Mr. RHYNE. I will prepare them directly and solely on the interlocutory relief, rather than on the constitutional issue then?

The COURT. You may include whatever you want on the constitutional issue. The Court will have to decide what it will leave in the findings and what it will eliminate, if the Court considers it proper to make such findings.

Are there any other questions?

Can we estimate in any manner about how long it will take us to try the case? I ask that with no intention of restricting the time in any manner or degree, but only in dealing with the Assignment Commissioner and trying to fix future assignments, that they have some general idea of the Court's commitments, which facilitate their making other assignments.

Mr. RHYNE. I would say for the plaintiff's affirmative case, I would hope to finish it in one day, depending on the cross examination, and not more than two days. We will try in every possible way——

The COURT (interposing). I do not want to say to try to keep it to the minimum because, after all, you have the responsibility of trying the case in the manner that you feel is best, but you think about one day in general terms.

Mr. RHYNE. Yes; Your Honor. I will try my best to do that.

Mr. KLEINFELD. I think we will take about one hour.

The COURT. About one hour?

Mr. KLEINFELD. Yes.

The COURT. So if the Court allows on a tentative basis two days to the Assignment Commissioner for the Court's commitment, it will be reasonably accurate?

Mr. RHYNE. Yes.

The COURT. Is there anything else, gentlemen?

Mr. RHYNE. I have not, Your Honor.

Mr. KLEINFELD. I have nothing.

The COURT. I do not think we reached a conclusion on the matter of the status quo on the hearing.

Mr. RHYNE. No.

The COURT. The Government took the position that they were reluctant to stipulate any continuance. The Court would like to avoid the

responsibility for any more paper work than is necessary, but if necessary the Court will issue an order which will say that the status quo established by its order of Wednesday, April 6, will remain in full force and effect and binding on all parties to the litigation until disposition on May 10th of the trial on its merits.

Mr. KLEINFELD. In any event, remembering John L. Lewis, and there being an order of this Court, I do not see what can be done except obey the order of the Court.

(Thereupon the instant hearing was concluded.)

(Caption.)

MOTION TO QUASH SUBPOENA FOR PRODUCTION OF DOCUMENTARY EVIDENCE

Now comes J. Donald Kingsley, Acting Federal Security Administrator, upon whom a subpoena for production of documentary evidence was served in the above-entitled cause on behalf of the plaintiff, on April 15, 1949, and moves the court to quash said subpoena for the following reasons:

1. Because said subpoena is too vague and uncertain in not specifying what correspondence, records, reports or other writings are wanted or upon what subject matter.

2. Because said subpoena is too broad, and therefore unreasonable and oppressive, in that it purports to require the production of all records of the Federal Security Agency relating to the product known as Nutrilite Food Supplement, or Nutri-

lite Products, Inc., or Mytinger & Casselberry, Inc., or Lee S. Mytinger, or William S. Casselberry, or Carl F. Rehnberg, and would therefore require the production of writings that could have no possible bearing or relation to the matter before this Court.

3. Because the subpoena purports to require the production of records for inspection, and good cause therefor, as required by Rule 34, has not been shown.

4. Because the said subpoena would require the collection of records from many places and put an unreasonable clerical and administrative task upon the Federal Security Agency in making the said records available to the plaintiff.

5. Because the subpoena requires the production of records which are protected from disclosure for reasons of public policy by 21 C. F. R. Cum. Supp. Sec. 196.1.

6. Because the subpoena requires the Acting Federal Security Administrator to give oral testimony and constitutes unauthorized probing of the Administrator's mental processes in making the determination of probable cause.

A memorandum of points and authorities is attached.

Dated April 19, 1949.

ALEXANDER M. CAMPBELL,
Assistant Attorney General.

VINCENT A. KLEINFELD,
Attorney, Department of Justice.

In the United States Court of Appeals for the District of Columbia

Civil Action No. 5208–48

MYTINGER AND CASSELBERRY, INC., A CALIFORNIA CORPORATION, PLAINTIFF

v.

OSCAR R. EWING, ADMINISTRATOR, FEDERAL SECURITY AGENCY, ET AL., DEFENDANTS

WASHINGTON, D. C.,
Tuesday, April 19, 1949.

ARGUMENT ON MOTION TO QUASH SUBPOENA

Copy for Mr. Kleinfeld. Reported by Braxton Watson.

In the United States Court of Appeals for the District of Columbia

Civil Action No. 5208–48

MYTINGER AND CASSELBERRY, INC., A CALIFORNIA CORPORATION, PLAINTIFF

v.

OSCAR R. EWING, ADMINISTRATOR, FEDERAL SECURITY AGENCY, ET AL., DEFENDANTS

WASHINGTON, D. C.,
Tuesday, April 19, 1949.

MOTION TO QUASH SUBPOENA

The hearing in the above cause came on before Honorable Bennett Champ Clark, Associate Justice, at 3:30 p. m.

Appearances: Charles S. Rhyne, Esq., Attorney for Plaintiff. Vincent A. Kleinfeld, Esq., and William W. Goodrich, Esq., Attorneys for Defendants.

PROCEEDINGS

The COURT. I am not clear whether a one-judge court has jurisdiction on these matters. However, I will be glad to hear you subject to changing my mind on jurisdiction.

Mr. GOODRICH. Here is the three-judge statute. Down at the bottom, we think, is the authority for a single judge to pass on a motion of this kind. That is the authority, we think, that sustains your right to do so.

Do you have any comment on that, Mr. Rhyne?

Mr. RHYNE. I do not object.

Mr. GOODRICH. We filed with you our brief and a copy of the subpena.

Fundamentally, we are raising two points or three points with respect to the documents, and one point as to the right of counsel for the plaintiff to interrogate Mr. Kingsley on his so-called mental processes in reaching a decision.

First, I will devote myself to the documents. As you will note from the subpoena, what is called for is all the documents in the possession of the Federal Security Agency relating not only to Mytinger and Casselberry, Incorporated, in this case, but also to Nutrilite Products, the manufacturer of this food supplement, and Carl Rhenborg,

who is president of Nutrilite Products, and Mytinger and Casselberry in their individual capacity.

The rule on subpena recently has been amended by Rules on Civil Procedure. I refer to Rule 45 (d) 1, which indicates that designated documents may be called for. That rule is to be interpreted in the light of Rule 34, which requires showing a good cause before records may be required to be produced for inspection. There is no order; simply subpena.

In addition to that, we object to the subpena on the ground that it is unduly broad. It calls for records which relate back as far as 1939, records which are in the possession of all 16 of the Food and Drug Administration district offices, as well as the Washington office. For that reason we say it is unreasonable and oppressive.

A further reason on which we base our claim was the administrative and clerical work involved in getting the records. We believe we are excused under the authority cited in the brief and because of a regulation promulgated a number of years ago which now appears in 21 Code of Federal Regulations in cumulative supplement dealing with disclosure of records of a government agency.

There is in this case no question of waiver, in view of the fact that the United States is not a party, this action having been brought on the theory that the statute was unconstitutional. For

that reason these people sued in their individual capacity. Of course, they would have no right to sue the United States without its consent.

Now, with respect to questioning Mr. Kingsley, the authorities I have cited are the *Morgan* case and the decision of Norris and Hirshburg against the Securities and Exchange Commission of this Court, both holding that inquiry into the mental processes, so-called decisional processes, is not proper. I know nothing else that can be asked of Mr. Kingsley than the details of decisional process.

Those are the grounds on which we base our motion to quash.

Mr. RHYNE. In this case, of course, we object to the motion to quash. We say it is merely a part of the Government's stalling tactics to prevent the trial on merit in this case, to which we object.

I think of all the people who are subject to the Federal Rules of Civil Procedure, the Government should be the one that is the quickest to allow discovery freely and give facts that are necessary to prepare to try a lawsuit.

In this case they charge our labeling is misleading, which is a very broad charge. We have asked for the records.

When this case was pre-tried before Judge Tamm he himself raised this question. I will not read all that he had to say about it, except that he called attention to the rules. He tried to ob-

viate this necessity of having all of these motions to quash, and everything, because I told him that I thought the Government would probably make such a motion. He pointed out, "You have that right." He had pointed out previously, "Under the interpretation of Rule 26 and 33 you have the right to take deposition either to obtain evidentiary material or obtain the source of the evidentiary material.

In this case I certainly am not trying to learn anything that it is improper for me to learn. As I say, they have leveled a very broad, general charge. I think if there is anything in their records that relates to us, we are entitled to see it. It will avoid surprise. It will shorten the length of the trial if we know what we are going to be faced with.

This charge about inquiring into the mental processes of Mr. Kingsley, I think, is far-fetched. Mr. Kingsley has been acting for Mr. Ewing for a long period of time. He has had correspondence with me. He has had conversations with Senators and Congressmen who have asked him to grant us a hearing and to hear our side of this before he made this decision. So, I do not think it is improper for us to ask him about those things.

All I want to do is develop the facts that are relevant to the issues in this case. The issue is a very broad one. I have had other subpenas against other Government agencies. The only

one that I can remember any contest on was against the RFC, and it did not take Judge Schweinhaut very long to rule that we were entitled to everything that they had in their files that related to this particular case, which was a damage case, and which included the insurance policy. He said that the Government, of all people, should not try to hide facts; they should be coming forward to see that justice is done.

I was handed this memorandum this morning, their motion, and I have not had a chance to study their authorities. I think the rule is so clear that it gives us the right to these. It says, "the subpena may command the person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any matters within the scope of the examination permitted by Rule 26 (b)."

This is in the nature of discovery as well as for evidence. So, I think their motion is not well taken at all.

We cannot be expected to name all of the documents in their files since we do not know what is in there. For example, the only deposition we have taken so far was that of Mr. Nelson, who is head of their Vitamin Division, who testified that the first time his attention was called to this was by the American Medical Association, and he wrote them an opinion and they refused to let us

look at that opinion to see just what he told them. So, I believe that our subpena is entirely proper, entirely within the rule.

I do not see how a Government agency can say it is oppressive to them to have to produce documents within their possession which we need in order to prepare for trial. Therefore, I ask that the motion be denied.

Mr. KLEINFELD. Your Honor, first, I am a little bit surprised that the Government is being accused of stalling tactics. We wanted to try this case on April 29, the day originally set, and it was at Mr. Rhyne's earnest behest that we adjourned for two weeks. I do not see how we can be accused of stalling. It was Mr. Rhyne who asked for the extra two weeks.

The COURT. I would not say that, Mr. Kleinfeld. As a matter of fact, the reason the case was continued for a little while was that Judge Goldsborough and Judge Tamm had to be temporarily out of town. I have been here all of the time. I would have been glad to hear the case any day when I was not sitting over in this court myself. I do not think it is fair to say there was any continuance at the behest of either side.

Mr. KLEINFELD. At the pre-trial conference before Judge Tamm the question did come up. I objected to it and Mr. Rhyne did not. Whatever the reason, it was fought out there before Judge Tamm at the pre-trial conference.

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The COURT. I have read the record of the pre-trial.

Mr. KLEINFELD. Mr. Rhyne mentioned the question of his being surprised at the trial. At the pre-trial conference both sides set forth what they intended to prove at the trial. The Government indicated that the only documents the Government intended to produce at that time are the original findings of fact and conclusions of law which are involved so closely in this action. We do not intend to put on any documentary evidence. We said that at the pre-trial conference.

Supposing we served a similar subpena duces tecum on the plaintiff here such as they served on us, just serve a subpena to produce all the documents in your possession involving or pertaining to Nutrilite. It would disrupt their entire business. They are asking us to do that very thing.

The COURT. Mr. Kleinfeld, I have tried a lot of those subpena duces tecum cases. It does seem to me that this is a peculiar case, in view of the fact of the multiple seizure operation which the Department has been carrying on. They cannot possibly tell the precise documents which are set out.

As I see it, the only point under the statute is the word "designate."

It seems to me that this case of multiple seizure is outside of the general rule. When people are being sued all over the country, they cannot know

precisely what documents are relied on by the Department and therefore what they want to find.

Undoubtedly—I say "undoubtedly," although I am not authorized to represent them—the petitioners here would be glad to stipulate as to what documents they want, but the Department will not tell them anything. It is like an income tax case where the Defendant is always at his risk and the Department refuses to disclose anything that they may have or what they propose to do.

Now, it seems to me that in multiple seizure cases the adverse party has some rights to find out on what the prosecution is based.

Mr. GOODRICH. There are now in process oral depositions of Dr. Dunbar and Mr. Larrick, the two principal officials of the Food and Drug Administration. We have just come from Dr. Dunbar.

This question goes to the production of records, not to the oral part. The only time we are raising the question of oral deposition is with Mr. Kingsley.

The COURT. Aren't they entitled to have the basis of what the oral depositions would probably be? It seems so to me.

Mr. RHYNE. That is certainly my interpretation of it.

Insofar as private parties are concerned, there would be no question that you would have a right to look at the records. This is a civil case under

the rules. It would seem that is the only way we can test the truth of the oral statements they make; for example, by looking at the writings in the record.

Mr. GOODRICH. The authorities we have cited are authorities in private litigation, for the most part. They point out that where a party asks for a large number of documents he must show their relevancy.

The COURT. I am very familiar with that rule.

For instance, one time the Commissioner of Securities in Missouri urged all the brokerage firms in New York to bring up all of their records to St. Louis. I went up and protested that. They employed me. I was rejected by the Securities Commissioner and I went across the street and got a writ of prohibition, which we use very frequently in Missouri, against the Commissioner of Missouri from doing it. That does not seem to me to be the case. That is a case of multiple seizure. These people allege that their business is being ruined without due process of law. Therefore, it does seem to me that they are entitled to their day in court.

I might say at this time that the holding of this three-judge court—and I say frankly that I have never been absolutely certain of the jurisdiction of the three-judge court—but according to our view we are not bound by Judge Pine's decision in this matter.

Since there has been an amended complaint filed, we think we have not only the question of constitutionality but also the question of oppressive use of what may be a constitutional process in force.

That is what we want to be enlightened on.

In that view it seems that the complainant is entitled to take evidence on the merits of the case.

Mr. GOODRICH. We do not dispute that.

The COURT. I understand you dispute that.

Mr. GOODRICH. I beg your pardon.

The COURT. That at the present time is the holding of the Court. Certainly, I have not changed my mind about it.

All I want to know now is whether this subpena exceeds limits of a proper subpena. In this peculiar kind of a case, up to date I cannot see that it does.

They have no means of knowing the specific documents that they want to see. There is no possible means by which they could know the file number or anything else of the reports on which you have based these multiple seizure actions. It does seem to me that that rule does not apply in such a situation.

Mr. KLEINFELD. May I address the Court?

The COURT. Yes.

Mr. KLEINFELD. I am a little puzzled, because the Government has stated, and I think will state at the trial, that it is proceeding on the basis of a determination made by the Federal Security Ad-

ministrator, made on his looking at the label of advertising, and, as the statute states, relying on a certain finding of fact made by medical doctor, which we have referred to, and which we will introduce at the trial. That is going to be, as far as I know, the Government's case.

We are not going to introduce any horde of documents. We are anxious to help. As a matter of fact, when counsel for plaintiff, Mr. Rhyne, asked us to agree to the subpena, I stated, "No, but let's find out approximately what you want and then we can decide."

If we had any idea, approximately, what they want, I think we would be happy to give it to them. But, to say every document all over the country pertaining to Nutrilite, I think, in spite of the fact it is an unusual case, it is putting a tremendous burden on the Government.

The COURT. Can you stipulate what documents you want or anything of that sort?

Mr. RHYNE. It is very difficult for me to do so.

The COURT. I can understand that.

Mr. RHYNE. You can understand the situation I am in. I do not know what they have in their files. We have been denied a hearing and a right to present our side of this case at all. So, we do not know what they have. We would like to know so we can meet it at the trial. I think the only way we can meet it is have them produce the documents.

If their objection goes to the fact that some of these records are in other parts of the country, I would be quite willing, until they could produce them, or I would be quite willing to examine what they have in their Washington office and then tell them whether it is necessary to produce the others. But, I think, without at least a look at their file and the records, we are completely in the dark.

We come up to the trial and it would probably mean the trial would be prolonged by our requiring certain documents that I cannot specify now. I think I am in a rather unusual position since we know so little about the Government's side of the case. I took Mr. Kleinfeld's deposition and asked him who his witnesses were and he could not tell me. I took this Mr. Nelson's deposition, who is head of their Vitamin Section, and he indicated a lot of unusual things. He stated that although it is his duty to render opinions on labeling, he had never been consulted except by this Medical Association man, besides some assistant to Mr. Kingsley recently on price only.

So, it is a rather unusual case. It is very difficult for me to do more than to ask to look at their records.

It seems to me that all the records with respect to Nutrilite are in one place and we could look at them in a very few minutes. They can pull their files out and we can go through them. I have

done that in many cases. I do not see why it is objectionable here unless they have something in there they do not want us to see. I would like to see this opinion they rendered to the American Medical Association. I think I am entitled to see it for the purpose of discovery. I do not know whether it would be evidence. It might lead me to evidence that would be very, very unusual in this case, because if the head of their Vitamin Section did not know anything about this case until the first of this year when the American Medical Association people contacted him, it might give me a lot of leads to the oppressive things they have done, why they have done them, and who is back of them.

So, I think the request is not unreasonable.

I will be glad at this time to limit it to the records here in Washington, and then if I find those records indicate that they have other records in other parts of the country, especially in Los Angeles, where this case has been developed, I would certainly want to look at them. I just can't see how that is an unreasonable position at all.

The COURT. You mean you would be willing to have a court order permitting you to see the records in Washington without prejudice to an application to examine the records in some other place?

Mr. RHYNE. Yes, Your Honor. The only qualification on that that I would like to make at this time is that in Los Angeles, in particular, I have

associate counsel who is going to take depositions out there. We would like to look at their records out there that relate to it. But, these 15 other places in the United States where they have records, why, I would not want to produce those at this time. I would be quite willing to have that limitation imposed.

The COURT. What do you say, Mr. Goodrich?

Mr. GOODRICH. As Your Honor knows, those records, as I stated, go back to 1939.

There is a criminal indictment pending against this firm in Los Angeles. They have been indicted by a Federal Grand Jury. That case is approximately ready for trial. As you know, no discovery is allowable in that type of case. The records in that case could have no possible relationship to these cases, that case having been instituted, as Your Honor knows, in September, before the first of those seizures.

We are concerned by the long span of time and the large volume of records. For that reason we respectfully ask Your Honor, if you are disposed to grant the discovery of those records, to place some reasonable restriction on it as to time and place and to exclude from it the criminal case in which discovery would be entirely improper.

The COURT. Mr. Kleinfeld, did you wish to say anything?

Mr. KLEINFELD. I may be repeating myself, but again I say, Your Honor, that if we consider the issue involved in this case, as it stands before

this Court, to wit, whether the labeling is materially misleading, I really do not see how there is such an urgent necessity on their part, which, apparently, is a fishing expedition to find something that may help them.

The issue before this Court would really be for the Court to decide, to look at this pamphlet——

The COURT (interposing). Mr. Kleinfeld, this thing has gone on for several years without the Government ever moving in.

Mr. GOODRICH. If I might explain those facts.

Mr. RHYNE. Before you do it, may I say a word about the criminal case? I think the Court should be advised that the delay there was first at the request of the Government because there was a case pending in the Supreme Court of the United States. We thought we had an understanding that they would make no seizures during that time. But, they say their understanding only related to seizure in Los Angeles and not to the United States, and they made these other seizures.

Then when the case came up, I believe it was on about the 5th of April, the judge there indicated that he did not see that it would do a lot of good to try a case on labeling when it was admitted that they had discontinued almost two years before. He put the thing over on his own motion. So, there has been no delay at our request in the criminal case at all. The delay only

came at the Government's request. I would like for the record to show that.

Mr. GOODRICH. Actually, I hate to get into those side issues.

The COURT. I will be glad to hear you.

Mr. GOODRICH. The case was scheduled on April 5th. A few days in advance of April 5th the defendant filed some motions to suppress evidence and fo dismiss. That is the reason the case went over rather than what Mr. Rhyne states.

But, going back to these records, this product is produced by a man named Carl Rhenborg. He started in 1939 in California. He did no interstate business of any significance, that is, until 1945, when Mytinger and Casselberry took over the national sales. Up until that time they did only one percent of interstate business, and that amounted to one percent of $10,000. Starting in 1945, in September, which is admitted in the complaint by the Plaintiff, they took over the national distributorship and in the first year sold about $100,000 worth.

Beginning in 1947, October 1947, they hit upon this plan of "How to get well and stay well" in its present form, and other sales manual and other sales technique, from 1947, October, until the present date there have been tremendous increases in distribution.

After the distribution became a substantial figure of our national life, as you will see, the

Food and Drug Administration agents encountered it from place to place. That took a little time to investigate. The people were notified to come in for a hearing in advance of the facts being reported to the Department of Justice from criminal action. That was in July of 1948. No, I believe it was July of 1947. I am not sure. But, anyhow, sometime before, and there were several delays there. The Government has not delayed in striking at what we consider a serious imposition upon the public from that time on, although it has been on the market, and, I freely admit, since 1939.

Those are the facts.

The COURT. How long would it take the Government to get in these divers reports? What I mean to say that is that I used to be a regimental commander in the Army at one time. If the commanding authority of the War Department or division commander, or anybody else, had wired me to get in my consolidated morning report, it would not have taken me 15 minutes to send it in.

Mr. GOODRICH. Having been in the Navy, I know what you mean there. The Government moves a little bit slower.

We could get them in in a reasonably short time. It is a question of having some reasonable limitation on the amount of papers they might look at.

The COURT. On depositions you can always object to the introduction of anything that you do not think is material.

Mr. GOODRICH. We believe the authorities authorize us to object in advance to anything that is not relevant. Those are the cases which we have cited to Your Honor.

The COURT. That leaves it to the Government bureau to decide what is material and what is not. But, in a procedure where the Government is the aggressor, so to speak, why shouldn't the other side have the opportunity of using the right of deposition to discover the position of the Government and to determine whether the reports on which the Government has operated is relevant or not?

Mr. GOODRICH. We wish only to proceed under the rules. They have the right under the rules to free discovery on oral deposition of our people. Under the rules they have no right to documents without showing of relevancy. That is our opinion of the law. We could be wrong, of course. That is the question that is before Your Honor.

We respectfully submit those authorities to you and ask your indulgence in considering them.

The COURT. I will be glad to examine them in detail.

Mr. KLEINFELD. I would like to ask Your Honor that since the proceedings are in discovery, and since the Government has nothing to hide, and I

am sure Mr. Rhyne's clients have nothing to hide, that whatever right of discovery Your Honor grants to the Plaintiff, Your Honor grants to the Defendant here, so that we may examine all the documents of the Plaintiff with respect to Nutrilite.

Mr. RHYNE. We have not objection whatever to your examination of our records. As a matter of fact, you have been through our files many, many times. Your inspectors have been looking out there and they have looked at everything we have got. So, we have no objection to your looking at anything we have.

Mr. KLEINFELD. Whatever Your Honor does enter, I respectfully ask that the Government be given the same right.

The COURT. The Court will deny the motion to quash, with a provision that either side may have the same opportunity for examining the documents involved.

Mr. GOODRICH. Does your denial go to our point about the interrogation of Mr. Kingsley? That is a separate point.

The COURT. Yes, it does. I think Mr. Kingsley is entitled to be examined.

Mr. RHYNE. Would you like for me to submit a formal order?

The COURT. I would be glad for you to do it if it provides that both sides have the opportunity to examine the documents.

I can understand that it is very difficult for either one of you to pick out a particular document and specify the date and number of it. I do think that either side is entitled to examine the "essential" documents leading up to this deci- of the Administrator.

Mr. GOODRICH. Will Your Honor qualify as to the "essential" documents leading up to this decision in this probable case?

The COURT. Yes.

Mr. RHYNE. May I ask one question about this latest matter? Who will determine the essentiality of documents?

The COURT. The Court will ultimately have to do it.

Mr. RHYNE. I am entitled to look at all the documents now in this discovery proceeding?

The COURT. I think that is true, and they are entitled to look at all the documents in the discovery process, too. If it turns out to be burdensome to get these reports from the outlying districts, the Court then will entertain a motion to modify as to them.

Mr. GOODRICH. Does Your Honor's ruling go to the documents in the criminal case?

The COURT. No, it does not.

Mr. GOODRICH. No documents in the criminal case?

The COURT. It goes to documents having to do with this particular case. That is all we have jurisdiction over.

Let me state to you that what Mr. Rhyne stated the other day over in the court is perfectly correct, that this language that you rely on in that statute was slipped in there. I was a member of the subcommittee, as well as the full committee of the Commerce Committee of the Senate, which fought over that bill for a number of years, and we fought particularly over multiple seizures, and Mr. Campbell, who was then the head of the Food and Drug Administration, came up and he made a fine case on exactly the same basis of this business of the seizure of this salt company. We finally agreed to it. I did not happen to be a member of the Conferees, and I was negligent, I freely admit, that I did not notice it in the conference report. It was slipped in the conference report and never intended to be there, neither in the Senate nor the House.

This is off the record.

(Thereupon, at 4:00 p. m., the hearing was concluded.)

In the United States District Court for the District of Columbia

Civil Action No. 5208–48

MYTINGER AND CASSELBERRY, INC., A CALIFORNIA CORPORATION, PLAINTIFF

v.

OSCAR R. EWING, ADMINISTRATOR, FEDERAL SECURITY AGENCY, ET AL., DEFENDANTS

ORDER DENYING MOTION TO QUASH SUBPOENA

Order

Defendants' Motion to Quash the subpoena directed to J. Donald Kingsley, Acting Federal Security Administrator, for the production of documentary evidence, and for oral testimony in the above-entitled cause, having come on to be heard, and the Court having heard oral argument by counsel for both the Plaintiff and the Defendants, it is this 29th day of April 1949,

Ordered, adjudged, and decreed that Defendants' motion to quash be, and it is hereby, denied, and that the defendants produce all correspondence, records, reports, or other writings in the possession, custody, or control of the Federal Security Agency or of any officials, agents, or employees thereof relating to the product known as Nutrilite Food Supplement or Nutrilite Products, Inc., or Mytinger & Casselberry, Inc., or Carl F. Rehnborg or Lee S. Mytinger or William S. Casselberry, insofar as they relate to the decisions of probable cause made in this case, but excluding the records that relate to the criminal action against Lee S. Mytinger and William S. Casselberry now pending in the United States District Court for the Southern District of California, and it is further

Ordered, adjudged, and decreed that the Defendants shall have a like right to inspect all doc-

uments in the possession, custody, or control of Nutrilite Products, Inc., Mytinger & Casselberry, Inc., Carl F. Rehnborg, Lee S. Mytinger, William S. Casselberry, or of any officials, agents, or employees thereof, relating to the product known as Nutrilite Food Supplement or Nutrilite Products, Inc.

This order shall be without prejudice to the right of either party to make any motion limiting the production of any correspondence, records, reports, and other writings upon a proper showing that such production is unreasonably burdensome or oppressive.

(S) CLARK, *Judge.*

Approved as to form:

_____ _____,

Attorney for Defendants.

U. S. GOVERNMENT PRINTING OFFICE: 1949

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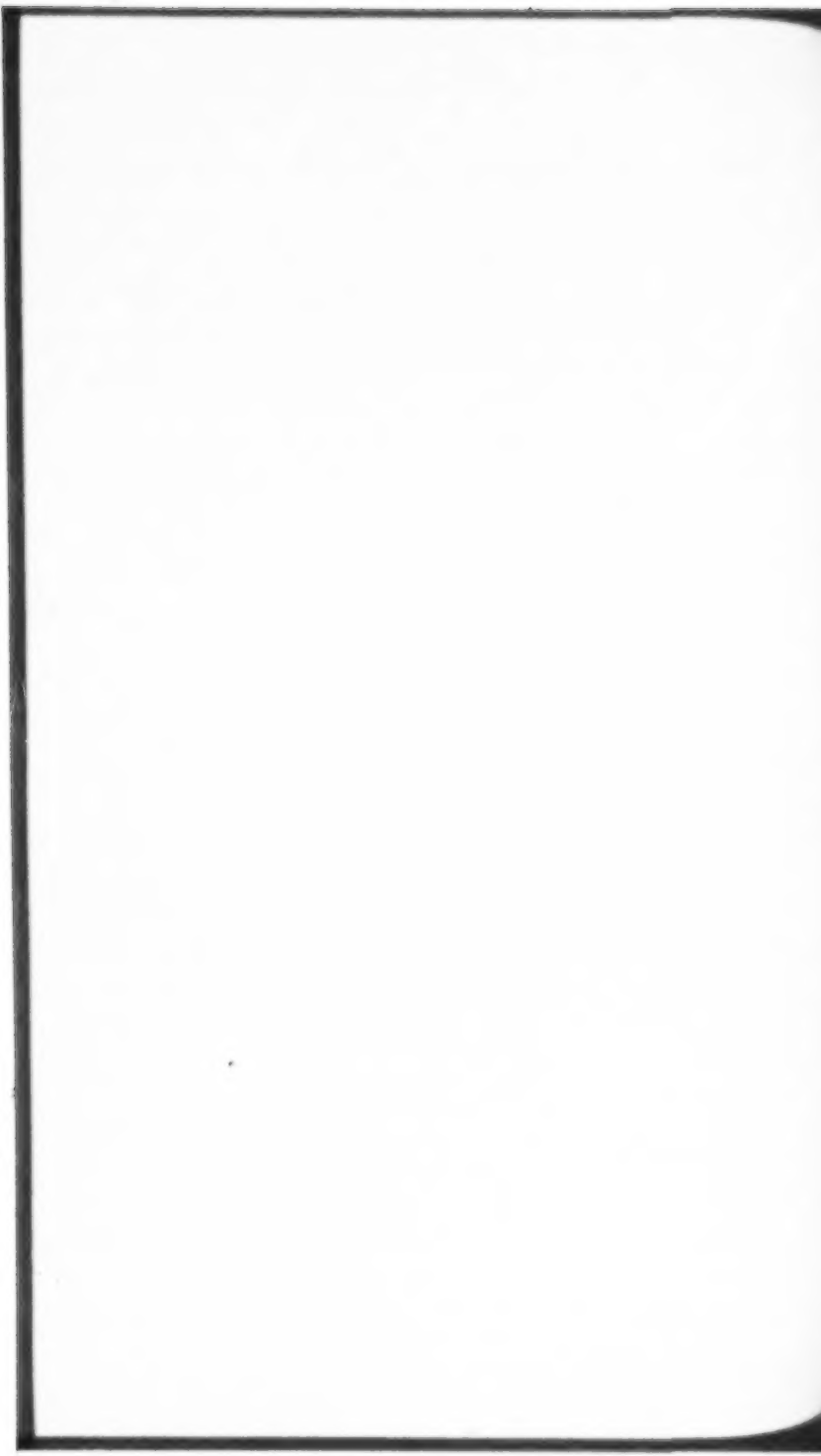

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No. 597, Misc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

IN THE MATTER OF THE FEDERAL SECURITY ADMINISTRATOR, ET AL.

Response of the Honorable Bennett Champ Clark, Associate Judge, United States Court of Appeals for the District of Columbia Circuit, The Honorable T. Alan Goldsborough, and The Honorable Edward A. Tamm, United States District Judges for the District of Columbia, to the Rule to Show Cause in the Above Entitled Case.

RETURN TO THE RULE TO SHOW CAUSE.

The Respondents, submitting themselves to the jurisdiction of this Court, make return as follows to the rule to show cause entered against them:

STATEMENT OF FACTS ALLEGED IN COMPLAINT.

The case, Mytinger & Casselberry, Inc. v. Ewing, et al., No. 5208-48, in the United States District Court for the District of Columbia, came on to be heard before Respondents on April 6, 1949, on Defendants' motion to dismiss an amended Complaint which alleged:

That Defendants had, in excess of their lawful duties, arbitrarily and deliberately instituted and pursued a course of action against the Plaintiff designed solely to-

ward harassment and the total destruction of Plaintiff's business prior to any possible adjudication of the merits of the dispute between the parties over use by Plaintiff of a certain advertising booklet in selling its product "Nutrilite Food Supplement"; that said product is not dangerous, deleterious or harmful to the public health or welfare and the experience of thousands of users prove that it is in fact extremely valuable as a health aid. (Amended Complaint, paragraph 18 (b)); that doctors use the product and prescribe it for their patients (Affidavit of Drs. Robinson and McCurdy attached to original complaint) and that pursuant to the aforesaid deliberate oppressive course of action, Defendants had carried out eleven seizures of Plaintiff's product from Plaintiff's distributors in widely separated parts of the Nation, i.e.,

Belleville, New Jersey
New York City, New York
Buffalo, New York
Hastings, Nebraska
Belleville, New Jersey (second seizure)
Spokane, Washington
Seattle, Washington
Clarkfield, Minnesota
St. Petersburg, Florida, and
Chicago, Illinois (two seizures)

The amended complaint further alleges that defendants have the names and addresses (Paragraphs 6, 7) of Plaintiff's 5,000 distributors located throughout the Nation (Paragraph 14) and Defendants now threaten to make more such seizures and have officially approved such action already (Paragraphs 12, 14); that in each case the seizure actions contain substantially identical statements. It is claimed that no separate issues of fact or law necessitate such numerous seizures since trial of one seizure case will determine the dispute between the parties over said booklet and no necessity exists of oppressing and

harassing the Plaintiff with these numerous actions. (Paragraphs 11, 14)

The amended complaint further alleges that this oppressive course of conduct of Defendants is arbitrary, capricious, unreasonable and unlawful and that it deprives Plaintiff of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States. (Paragraph 22)

At the argument before respondents on April 6, 1949, Counsel for Defendants admitted that the product sold by Plaintiff is harmless and non-toxic and no question of adulteration or fraud is involved in this case, but argued that the advertising booklet used by Plaintiff is misleading and said booklet might cause indirect harm to purchasers of the product by keeping them away from doctors. (Transcript of argument, April 6, p. 13) Plaintiff contended that said booklet reveals that it very carefully urges just the opposite course of conduct with the two paragraphs preceding the last paragraph thereof providing:

> "When you read this book do you conclude that because NUTRILITE Food Supplement provides your body with material that may be needed due to previous deficiencies, for rebuilding and regulating, that all medication would have to stop when NUTRILITE is added to your diet? If so, you are wrong. Just as you would continue to take any needed medicine even if you added beefsteak or whole wheat bread to your diet, so you continue the use of any needed medicine when you add NUTRILITE Food Supplement to your diet.
>
> "When you begin the use of *any* food supplement, be sure to consider also if there is any possibility that you need the services of a physician. If there is any evidence that a doctor should be consulted, you should do so. Bear in mind that in the use of any food supplement you are only improving your nutritional status. You may have other conditions that require the services of a physician, in which event you should consult a doctor immediately. It is a sound health rule to see your dentist twice a year and to have a regular periodic check-up by your physician."

It is further alleged in the amended complaint that a very large percentage of Plaintiff's sales are to persons unsolicited by Plaintiff through said booklet but who buy the product, because of favorable recommendations of users of said product; and (Paragraph 5) that the product now sold by Plaintiff has been on the market since 1933 (Paragraph 5). It appears that the advertising booklet now complained of by Defendants in its original form first came to the attention of Defendants in 1939 with Defendants keeping almost constant supervision over said product since that time (Affidavit of Larrick attached to Defendant's motion to dismiss, paragraphs 2, 3). The Amended Complaint further alleges that in July, 1947, the Defendants claimed a shortage of Vitamin B_1 content in Plaintiff's product and questioned the advertising booklet's contents; that the shortage charge was proved to be erroneous by an independent laboratory analysis and the booklet was rewritten and "republished in revised form in conformance with the views of the Food and Drug Administration as the same were explained to Plaintiff and its attorney" (Paragraph 8); that only other official contact between Plaintiff and Defendants since said revision of said booklet and before institution of the litigation described in the Complaint arose when Plaintiff heard Defendants were interrogating its distributors and customers and requested advice as to whether any question of conformity of its (labeling) advertising with the law had arisen and Defendants' representative said nothing adverse about the advertising booklet but referred to the investigation by Defendants as merely "routine" in character (Paragraph 9). The next action of Defendants is that described above, i.e., seizures in widely separate sections of the United States with admitted threats by Defendants of more and more seizures to come.

The foregoing are facts which Respondents believe raise an issue, not yet decided by Respondents, of an unconstitutional abuse of power by Defendants in violation of the

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due process clause of the Fifth Amendment. In two affidavits filed in support of their motion to dismiss, and in their answer, Defendants contradict some of these facts thereby creating issues of fact necessitating a trial. Examination of these affidavits reveals that Defendants themselves in said affidavits do raise every issue of fact set forth in the original complaint before Judge Pine with the Dunbar affidavit being devoted particularly to Defendants' factual contentions with respect to Plaintiff's advertising booklet. With facts averred in the amended complaint and contradicted in the Affidavits, the Court could not accept either version for the purposes of the Motion to Dismiss (Rule 56, Federal Rules of Civil Procedure).

Furthermore, the amended Complaint brought before the Court every factual allegation therein. Judge Pine's order gave general leave to amend and did not preclude Respondents from inquiring into these facts as they relate to the issues before Respondents. Also, whole paragraphs of the original complaint were omitted in the amended complaint and new facts alleged on the issue of harassment and oppressive conduct. The attached Amended Complaint (Exhibit A) indicates by underlining new matter not in the original complaint. Particular reference is made to paragraphs 11, 12, 14, 16, 17, 18, 20, 22, 24, 25, 26, and the prayers, all showing allegations of extensive new facts.

The Amended complaint also alleges that "the multiple seizure provisions of Section 304(a) of the Food, Drug and Cosmetic Act of 1938, *as applied to the Plaintiff under the facts set forth in this Amended Complaint,* are unconstitutional in that they deprive the Plaintiff of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States. (Paragraph 18(c)). On this second constitutional issue the facts alleged in the Amended Complaint show that the Defendants made the eleven seizures above referred to on the authority of authorizing decisions by administrative officials lacking legal power to make such decisions.

(Transcript of hearing before Judge Pine of Jan. 24, 1949, pp. 38-39). Judge Pine, in holding Defendants' first actions illegal and unauthorized held further that only the Administrator of the Federal Security Agency could, under the Statute, make authorizing decisions under which Defendants could make multiple seizures. (Transcript of hearing, Jan. 24, 1949, pp. 38-39). Following said decision Plaintiff made two written requests to the Administrator that he hear Plaintiff's side of the dispute before he made any decision on the character of the advertising booklet referred to above. The Amended Complaint charges: "In said written requests . . . Plaintiff most respectfully prayed that said administrator grant it a hearing so that Plaintiff could present to him the full and true facts showing that the labeling (the booklet) of Nutrilite Food Supplement is not misleading in any respect. The Administrator was further advised that the consequences of an erroneous decision on the issue of probable cause would be that Plaintiff would be put out of business completely and irreparably damaged by the multiple seizures so authorized and threatened by Defendants prior to any possible opportunity Plaintiff might have to defend itself against said erroneous decision." The Administrator denied the requests for a hearing and determined *ex parte* that Plaintiff's booklet is misleading (Paragraph 18 (a)).

Plaintiff further alleges that there is no emergency requiring summary *ex parte* action against Plaintiff's product and Defendants have had and now have an adequate time within which they can grant Plaintiff a hearing, during which time no person will be injured in any way (Paragraph 18 (b)). The Larrick affidavit referred to above shows that Defendants had knowledge of the booklet which they now claim is misleading since 1939, and the Amended Complaint alleges that in July, 1947, said booklet was revised in conformity with Defendants' views. The long delay of Defendants in instituting the litigation described in the

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Amended Complaint, although they have maintained almost constant supervision over Plaintiff and its predecessor (see Larrick affidavit) indicates there is no emergency as to Plaintiff's product or booklet affecting the public health in a substantial way. Otherwise, it is unreasonable to think Defendants would have waited so many years to take the action herein complained of. Counsel for Defendants at the pre-trial conference admitted this delay, saying in part ". . . maybe we were not as diligent as we should be, but the Government moves slowly and it has been a 'tough case'." (Page 58, Transcript pre-trial conference, April 13, 1949).

These foregoing facts which are set forth more fully in the Amended Complaint, in the view of Respondents, present two issues: (1) Constitutionality of that provision of the Food, Drug and Cosmetic act which provides for multiple seizures without a hearing prior to the authorizing decision in cases where as here no danger to public health exists and no emergency requiring immediate action appears, and (2) violation of due process by alleged arbitrary, capricious, unlawful, oppressive and unreasonable actions of the defendants. Defendants in the affidavits attached to their Motion to Dismiss and now in their Answer to the Amended Complaint dispute many of the foregoing facts, thereby creating issues of fact which only testimony of witnesses at a trial can resolve.

Answering the specific paragraphs of the Petition, Respondents state:

1. Paragraph 1 is admitted

2. Paragraph 2 is admitted.

3. Respondents have no information as to the facts set forth in Paragraph 3 as no such facts are of record.

4. Paragraph 4 is admitted, except that the amended complaint alleges two seizures in Illinois. Answering further, Respondents state that the complaint before the

Court specifically alleges that Defendants have threatened additional seizures, that no separate issues of fact or law necessitate these numerous seizures, as every such issue will be decided in one case and that no necessity exists for harassing Plaintiff by these many filed and threatened seizures. (Amended Complaint, Paragrapt 11).

5. The facts set forth in this paragraph are not of record and Respondents are therefore unable to reply to the statements made.

6. The facts stated in this paragraph are directly contrary to the facts stated in Paragraph 3 of the Amended Complaint as to the contents of the advertising booklet used by Mytinger and Casselberry, Inc., in selling their product. Said booklet, a copy of which is in the record, according to Defendants' admissions at the argument does not directly represent that the product "Nutrilite Food Supplement" will cure the conditions referred to in the Petition and Defendants' statements are merely its interpretation of the language used, an interpretation in direct conflict with the interpretation of the Plaintiff.

Contrary to the statements of Petitioners in Paragraph 6, the Amended Complaint states in Paragraph 3:

> "Said booklet contains a general discussion of nutrition, the need for vitamins and minerals in nutrition, and the deficiency conditions which can result from a lack of such factors in the diet."

Also contrary to the statement in Paragraph 6 of the Petition about the booklet, it is further alleged in Paragraphs 3 and 4 of the Amended Complaint as follows:

> "The statements contained in and upon the said . . . booklet have been prepared with care, under scientific and legal direction, and in the utmost of good faith; no representations have been made thereunder which the Plaintiff and its officers and agents did not believe, and have reason to believe, were and are true; and nothing contained therein has been or is false, fraudu-

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lent, or in any respect misleading to the injury or damage of any purchaser or consumer.

"The product 'Nutrilite Food Supplement' contains no substance or material or combination of substances or materials harmful or deleterious in any manner whatsoever to human users thereof and in fact does contain substances and materials which have been demonstrated by scientific tests and by actual experience of users to be helpful to the health of human beings. No claim has at any time been made by any Federal, State or other governmental agency that Nutrilite Food Supplement is adulterated or harmful in any manner whatsoever to the health of human users thereof."

These contentions raise direct issues of fact.

7 and 8. These paragraphs are not an accurate summary of the facts set forth in the original complaint or of the relief requested therein. Reference is made to the copy of said original complaint on file in this Court. Petitioners' summary omits reference to the allegations in the complaint of unreasonable, deliberate, unlawful, arbitrary and capricious conduct by the Defendants over and beyond their prescribed statutory duties which oppressive conduct was and is, it is charged, specifically designed to harass and ruin Plaintiff's business and good will prior to any adjudication of the merits of Plaintiff's advertising in the numerous libel seizure actions. (See Paragraphs 12, 13, 15, 16, 17 and 18.)

9. The statement in Paragraph 9 with reference to Judge Pine's denying the temporary injunction is incorrect. Judge Pine, in denying the Defendant's original motion to dismiss on January 24, 1949, specifically stated on page 39 of the transcript of said argument,

"So far as the injunction is concerned, I will issue that until there is another motion for summary judgment, if it is necessary. Do you believe it is necessary?"

The record then shows that the Government agreed to make no more seizures.

10. Answering Paragraph 10, Respondents state that no limitations were imposed upon the leave to amend in Judge Pine's order. As is shown by the marked copy of the Amended Complaint which is attached hereto, Plaintiff made extensive factual changes which went much further in raising the issue of abuse of power than did the original complaint in addition to the raising of the constitutionality of the multiple seizure provisions as applied to Plaintiff under the facts in this case.

11. Reference to the amended complaint and the original complaint shows substantial changes in a number of paragraphs, rendering the first sentence in this paragraph incorrect as reference to the attached Exhibit A, a marked copy of the amended complaint clearly shows. (All changes are shown in italics in said exhibit) In granting the temporary restraining order on March 4, 1949, Judge Tamm acted upon the verified complaint setting forth the facts found by him which are expressly set forth in detail in said temporary restraining order. The facts set forth therein showing irreparable injury to Plaintiff were admitted by Counsel for the Defendants, who was present at the time the motion for the temporary restraining order was presented to Judge Tamm. Answering further, Respondents state that at the argument before this special three-judge Court the following took place between Judge Goldsborough and Counsel for the Plaintiff:

> "JUDGE GOLDSBOROUGH: Well, then, as I understand it you are not relying entirely upon the Constitution. You are relying upon the want of due process in issue here. And you are also saying that the action was arbitrary and not in good faith, the intention was to put you out of business before you get a trial.
> "MR. RHYNE: Yes, Your Honor."

The statement of Petitioners with reference to Judge Pine's order becoming the law of the case on all questions except

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the constitutional issue is not correct. The full amended complaint was before the Respondents. Further, the Defendants filed affidavits in which they disputed certain facts in the verified amended complaint, which factual disputes required a hearing on the disputed issues of fact. Under Rule 56 of the Federal Rules of Civil Procedure the Defendants' motion could not be granted because the pleadings and affidavits on file show that there were these genuine issues of fact.

The remaining part of Paragraph 11 needs explanation. The Court did enter an order on April 6 denying the Defendants' motion to dismiss and the Court did grant a temporary restraining order to keep everything in status quo until the trial on the merits which was at that time scheduled for April 25. The statement in the petition that Defendants refused to stipulate and "the Court thereupon denied the motion to dismiss and granted a temporary restraining order and a preliminary injunction" which implies that the order denying the motion and the interlocutory relief were issued *only* because Defendants' counsel refused to stipulate is incorrect and contrary to the facts. Under 28 U. S. C. § 2284 the Respondents have authority to enter an order in substance continuing in effect the original restraining order under the facts of this case until the hearing at which evidence was to be received before action on the motion for a temporary injunction. This the Court did for the reasons explained in the Pre-trial Conference transcript. The Court did instruct Counsel to appear before the Court for a further preliminary hearing on Monday, April 11, in order that the Court could state its reasons for issuing the temporary restraining order and in order that the Court could outline to counsel the issues which were to be heard at the trial. An unfortunate illness of Judge Goldsborough prevented the holding of this session of the Court.

On April 13 a pretrial conference was held before Judge Tamm and since the Court has before it a complete transcript of said pretrial conference, no summary is here

made. Respectful attention is however called to the following statements made by the Court at the pretrial Conference which Petitioners do not quote in the excerpts set forth in their petition:

> "THE COURT: . . . I do want to put on the record the fact that the Court in reaching its determination considered that Judge Pine's action resulted in the filing of an amended complaint, which set forth all of the issues in the proceeding, and the Three-Judge Court consequently considered the amended complaint as the basis upon which it was required to take action. It considered the amended complaint, which raised certain factual issues, and so on, and the action of the Three-Judge Court was predicated upon the amended complaint, which, as I have indicated, the Court considered to embrace all the issues raised by the entire pleading of the amended complaint. I failed to make that clear in my statement that the Court considered all the factors, but it was predicated upon the phraseology of the amended complaint." (pp. 9-10, Transcript, April 13, 1949.)
>
> "The Court thought it would be taking unfair advantage of the Government in issuing a restraining order because counsel felt that Judge Pine's finding constituted an adjudication, other than a constitutional question, and issuing a temporary injunction, the Court felt would be taking unfair advantage of the Government, which came in on the assumption that the Court felt bound by Judge Pine's ruling, and it was for that reason that the order was drawn in the form it was.
>
> "The Court felt that the temporary restraining order would maintain the status quo and afford the Court an opportunity to explain to counsel its position with reference to matters which Government counsel, at least, and possibly plaintiff's counsel, had considered res judicata.
>
> "The Court intended to issue an interlocutory order to afford both sides an opportunity to prepare and present evidence upon which the Court would then make a finding upon the basis of which an appeal could be taken by either or both parties." (pp. 45-46, Transcript, April 13, 1949.)

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12. The excerpts in the Petition from the transcript of the pretrial conference held on April 13 are not statements of all the matters considered by the pretrial conference, as is stated in response to paragraph 11. No request was made by Defendants at the pre-trial conference for a pre-trial order. The facts are that Petitioners' Counsel inquired later as to whether a pre-trial order would be issued, and was told that none would be issued as there was no provision for such an order before a three-judge court.

13. In response to Paragraph 13, Respondents refer to the transcript of the pre-trial conference.

14. In response to paragraph 14 the first two sentences are admitted. With reference to the third sentence attention is called to the full text of the motion itself. Reference is also made to the order which was entered which gives *identical rights to the Plaintiff and the Defendants as to production of documents and examination of witnesses.* The record shows that subpoenas were also issued to Dr. Robert C. Butz, an employee of Defendants, and Elmer M. Nelson, head of the Vitamin Division of the Food and Drug Administration. The examination of the Government witnesses was permitted for the purpose of discovery of records or of evidence on the issues in the case with all questions on admissibility of evidence reserved for the trial. The record of the argument on the motion to quash clearly indicates that this was the case rather than that examination of witnesses was permitted for the purpose of inquiring into the mental processes of the witnesses as now claimed by Petitioners.

15. In response to paragraph 15, Respondents state that the authorizing decision which in this case could result in more than 5,000 seizures cannot be called preliminary in nature when Plaintiff alleges facts which if true show that a trial in a libel seizure action cannot prevent irreparable injury from these nation-wide seizures and that the injury is immediate, substantial and irreparable. The claim of administrative discretion is not applicable where as here

irreparable injury is shown and where such injury is inflicted without hearing by a course of conduct such as is described in the complaint. Respondents do not believe that Defendants or any other public official have administrative discretion to completely destroy Plaintiff's business of selling an admittedly harmless product prior to a hearing on the dispute over the advertising of that product. The two final statements in this paragraph on jurisdiction of Respondents do not take into consideration the facts in this case and the statutory and constitutional provisions applicable thereto.

16. In this paragraph Petitioners dispute the jurisdiction of Respondents to try the factual issues which Petitioners themselves created by their affidavits in support of their Motion to Dismiss and their answer herein. Respondents do have jurisdiction to decide the constitutional issue, the issue of deprivation of constitutional rights by abuse of power and all factual issues on the booklet and other matters related thereto. If, as alleged in the complaint, Defendants are exceeding their powers and denying constitutional rights, only a three-judge court such as Respondents can try such issues—the libel courts cannot. Defendants having themselves created an issue of fact relating to these issues in questioning the Amended Complaint's allegations as to the character of Plaintiff's advertising booklet, Respondents have no alternative than to decide this and all the other factual issues in the case.

17. The claim in this paragraph that the constitutional issue raised herein is insubstantial is refuted by the facts set forth in the first part of this response. It is clear that assuming these facts to be true, Plaintiff has been denied substantial constitutional rights to its substantial and irreparable injury. That these issues are indeed substantial is clearly shown by the Points and Authorities filed herein by both parties. The course of conduct of the Defendants herein as alleged in the Amended Complaint, if true, amounts to such an arbitrary exercise of power as to con-

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stitute a deprivation of due process of law. Denial of a hearing before the decisions authorizing multiple seizures under the facts alleged in the amended complaint likewise is a deprivation of due process as facts are set forth showing that the remedy of a trial in the libel actions is not adequate. Such remedy has not and cannot prevent the great and irreparable injury which Plaintiff alleges it has been and is subjected to prior to such a trial in any one of the libel actions. Petitioners challenged these facts in their affidavits and answer, and now seek to avoid a trial to determine the truth of their challenge on the very factual issues they themselves created. It has been stated to Respondents at the argument that no other statute allows infliction of irreparable injury without a hearing and that the particular constitutional points before Respondents have not been passed upon by any Court. When such a provision, characterized by Judge Pine as "shocking", "unfair", "drastic" and "harsh" (See transcript of hearings of Jan. 24, March 3) is up for decision for the first time, involving as it does such far-reaching concepts of constitutional law affecting so drastically the property of citizens, Respondents want a full and complete factual record upon which to decide this case and were proceeding in orderly fashion to develop this record when Defendants filed the instant action.

18. In this paragraph the Petitioners omit reference to the statement in the Complaint that the product has been sold since 1933 by others and by Plaintiff since 1945, and that prior to the current litigation outlined in the Amended Complaint, the Defendants only questioned the contents of the advertising booklet *one* time. As to this one time it is stated in paragraph 8 of the Amended Complaint that the booklet, to which Defendants now take exception, was revised and republished in conformance with the views of the Food and Drug Administration in July, 1947. The statement that the booklet is materially misleading to the injury and damage of the purchasing public is in direct con-

flict with the allegations in the Amended Complaint (Paragraphs 3, 18 (b)), and the statement that this booklet does irreparable injury to the public health, encourages purchasers to experiment with their lives, and causes irreparable injury to the buyer's pocketbook, is also in direct conflict with the verified Amended Complaint. (Paragraphs 3, 17, 18(b).) Again, Respondents respectfully show that they have not decided these questions of fact and state their belief that testimony of witnesses at a trial is necessary to enable the Respondents to make such decision.

Answering said paragraph further, it has been admitted by the Defendants that the product in question is harmless and non-toxic in character and that the only question raised by the Petitioners is that the advertising booklet is misleading. Counsel for the Petitioners in argument before Respondents claimed that the injury was indirect in that it may keep people from doctors (Transcript, April 6, p. 13), a statement which is in direct conflict with the verified Amended Complaint.

Respondents believe that since the Defendants had full knowledge of this product and its labeling admittedly since 1939 and since Defendants admittedly have done nothing to protect the public from any alleged injury for such a long period of time, the asserted injury to the public from taking a few days to try the merits of this controversy and even the time required for an appeal from any decision rendered thereon cannot be very substantial.

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MEMORANDUM OF LAW.

I.

A Substantial Constitutional Question Having Been Presented, the Special Three-Judge Court Has Jurisdiction to Decide All Issues Raised by the Complaint and Answer.

Replying further, the respondents respectfully suggest that a special three-judge district court appointed under the provisions of Section 2284 of Title 28 of the Code of Laws of the United States properly assumes jurisdiction where the questions raised as to the constitutional validity of an Act of Congress are substantial. The respondents further suggest that once a substantial constitutional question has been raised and jurisdiction thereby obtained, that a three-judge court may then determine every question involved in the litigation pertaining to the prayer for injunctive relief, in order that a single lawsuit may afford a final authoritative decision of the controversy between the parties. *Public Service Commission of Missouri* v. *Brashear,* 312 U. S. 621. Furthermore, this Honorable Court has stated in regard to three-judge courts convened to hear prayers for injunctive relief under other provisions of the Code of Laws of the United States that it could not be supposed that it was the intention of Congress to compel the exclusion of all grounds other than the unconstitutionality of an enactment. *Louisville & Nashville R. Co.* v. *Garrett,* 231 U. S. 298, 303. It has also been stated by this Honorable Court that once jurisdiction is properly obtained by a three-judge district court, then that jurisdiction extends to every question involved which will permit the court to effectively dispose of the case. *Sterling* v. *Constantin,* 287 U. S. 378. In addition respondents direct the attention of this Honorable Court to the following language from the decision of this Court in *Siler* v. *Louisville & N. R. Co.,* 213 U. S. 175, 191, which has been cited

with approval in several decisions of this Court relating to the jurisdiction of three-judge district courts:

> "The Federal questions as to the validity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the Circuit Court jurisdiction, and having properly obtained it, that Court had the right to decide all questions in the case, even though it decided the Federal question adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only."

The respondents were and are of the view that they were and are not bound by Judge Pine's ruling on the original Complaint. The respondents are further of the view that if the evidence at the trial were to indicate that the actions of the petitioners were arbitrary, capricious or unreasonable, then respondents would be in a position to grant the Plaintiff relief without determining the constitutionality of the multiple seizure provisions of the Food, Drug and Cosmetics Act as applied to the Plaintiff below. Respondents suggest to this Honorable Court that it appears to be well-settled that the granting of a motion to dismiss with leave to amend is not a final order so as to be appealable and therefore cannot be said to be *res judicata*. It has been stated by this Honorable Court that the sustaining of a demurrer to an original complaint with leave to amend does not preclude a plaintiff from renewing nor the Court from entertaining the same question of law upon a fuller development of the facts at the trial on an amended complaint. *Post* v. *Pearson*, 108 U. S. 418. The respondents were and are of the view that the entire Amended Complaint, filed with leave of Court, is properly before the Respondents and that the jurisdiction of the Respondents is not limited to the alleged unconstitutionality of the multiple seizure provisions of Section 304 of the Food, Drug and Cosmetic Act.

Petitioners also seek to have this Honorable Court issue a writ of mandamus ordering the Respondents to vacate

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the order which Petitioners choose to call a "temporary injunction". The Respondents respectfully point out that this order was not a "temporary injunction". Said order was explained to the attorneys for the Petitioners during the pretrial conference held before Judge Tamm as being intended to operate as a "temporary restraining order" in order to maintain the *status quo* until the hearing and determination by the Respondents. The Respondents were of the opinion that the Plaintiff below would suffer further irreparable injury unless the *status quo* were maintained, but the Respondents were also reluctant to issue a "temporary injunction" which might have repercussions in other litigation and matters with which the Petitioners were involved. Upon serious consideration of the various factors involved, the Respondents reached the conclusion that a "temporary restraining order" would not only safeguard the Plaintiff but would not prejudice the Petitioners, the Defendants below, in any other matters presently before them. The Respondents are of the view that the order as entered fully protected the immediate interests of the Plaintiff below and the broader interests of the present petitioners (See Transcript of the Pre-Trial Conference, pages 47-49).

The Respondents further suggest to this Honorable Court that the Petitioners over-emphasize the public interest affected by the temporary restraining order. If the public interest is as great as Petitioners suggest, it is difficult to reconcile the delay of several years before the question of the Plaintiff's advertising was brought before the libel courts. Further, Petitioners have delayed until almost a week before the date set for trial in seeking the aid of this Honorable Court although they had known of the intended trial since April 6. Furthermore, it has been brought to the attention of Respondents that the Petitioners have always been in a position to seek injunctive relief against Plaintiff to stop all sales of its product if the public interest were seriously involved. Section 302 of the Food,

Drug and Cosmetic Act specifically provides that the Petitioners may seek such injunctive relief. The attention of the Respondents has also been directed to H. R. 2139, 75th Congress, 3rd Session, pages 3-4, which recognizes that Congress included the injunctive section to provide the Government with a prompt remedy and to reduce litigation and the expense and hardship of seizure cases.

II.

No Facts Justifying Granting of the Extraordinary Relief Requested Are Present in This Case.

The Writs of Prohibition and Mandamus are Extraordinary Writs and are only granted in most unusual cases. The present case is not one calling for the issuance of such Extraordinary Writs, the Petitioners having an adequate remedy by appeal.

This Court has constantly emphasized that the writs of prohibition and mandamus, as herein sought, are extraordinary remedies which will be granted only under exceptional circumstances. The principles governing the issuance of such writs were recently reiterated by this Honorable Court in *Ex parte Fahey*, 332 U. S. 258, where *Mr. Justice Jackson* stated:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as a substitute for appeal. As extraordinary remedies, they are reserved for really extraordinary causes."

In *Ex Parte in the Matter of Chicago, Rock Island and Pacific Railway Co.*, 255 U. S. 273, *Mr. Justice Brandies*,

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speaking for the Court, said, beginning on page 275 of the opinion:

> "There is a well settled rule by which this Court is guided upon applications for a writ of prohibition to prevent a lower Court from wrongfully assuming jurisdiction of a party, of a cause, or of some collateral matter arising therein. If the lower Court is clearly without jurisdiction the writ will ordinarily be granted to one who at the outset objected to the jurisdiction, has preserved his rights by appropriate procedure and has no other remedy. *In re Rice*, 155 U. S. 396. If, however, the jurisdiction of the lower Court is doubtful, *Ex parte Muir*, 254 U. S. 522, or if the jurisdiction depends upon a finding of fact made upon evidence which is not in the record, *In re Cooper*, 143 U. S. 472, 506, 509, or if the complaining party has an adequate remedy by appeal or otherwise, *Ex parte Tiffany*, 252 U. S. 32, 37, *Ex parte Harding*, 219 U. S. 363, the writ ordinarily will be denied."

In *Ex parte Oklahoma*, 220 U. S. 191, *Mr. Chief Justice White* in delivering the majority opinion of this Court discharging a rule to show cause and denying a petition for the issuance of a writ of prohibition, stated as follows at page 208:

> "It will become apparent from even a mere superficial analysis that . . . the facts which we have stated afford no basis for the allowance of the writ of prohibition as prayed. This is obvious because, first, an adequate remedy was provided by law in each case, *even before final judgment*, for reviewing and correcting in the Circuit Court of Appeals any error committed by the court below in awarding interlocutory relief by injunction; second, because after final decree . . . adequate remedy existed at the election of the defendants to come directly to this court upon the question alone of the jurisdiction of the court below as a Federal Court over the respective causes; third, because even if these remedies were not resorted to and the cases had gone to final decrees against the defendants and they had chosen to appeal the whole case to the Circuit

> Court of Appeals, and that court had decided against them, there would be . . . a right in this court to review by appeal." [Emphasis supplied.]

In *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, this court stated that a writ of mandamus should not have issued where a district court had acted within its jurisdiction but may have acted erroneously.

Applying the foregoing to the facts of the instant case, it is respectfully submitted that prohibition and mandamus are not proper remedies here. Under the Judicial Code, Petitioners are given a right of appeal directly to this Honorable Court, not only from any final decree or determination of a three-judge district court convened under Section 2284 of the Judicial Code, but also from any interlocutory injunction issued by a three-judge district court.

Petitioners insist, although erroneously, that the temporary restraining order issued by the Respondents is in fact a temporary injunction. If this is the case, immediate steps could have been taken to expedite an appeal to this Court. Such has not been the case.

CONCLUSION.

The Respondents respectfully suggest that under the facts of this case, the extraordinary remedies prayed for by the Petitioners should be denied.

Respectfully submitted,

BENNETT CHAMP CLARK,
T. ALAN GOLDSBOROUGH,
EDWARD A. TAMM.

WALTER M. BASTIAN,
Attorney Specially Appointed.

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EXHIBIT A.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5208-48

MYTINGER AND CASSELBERRY, INC., *a California corporation*, 1724 Santa Fe Avenue, Long Beach, California, *Plaintiff*,

v.

OSCAR R. EWING, Administrator, Federal Security Agency,

PAUL B. DUNBAR, Commissioner, Food and Drug Administration,

CHARLES W. CRAWFORD, Associate Commissioner, Food and Drug Administration,

LOUIS D. ELLIOTT, Assistant Commissioner, Food and Drug Administration,

GEORGE P. LARRICK, Assistant Commissioner, Food and Drug Administration,

and

TOM C. CLARK, Attorney General of the United States, Washington, D. C.

Defendants.

Amended Complaint for Temporary and Permanent Injunction and Temporary Restraining Order.

1. Plaintiff is a California corporation, having its principal place of business in the City of Long Beach, California, which is located in the jurisdiction of the United States District Court for the Southern District of California, Central Division. Defendant Oscar R. Ewing is the Administrator of the Federal Security Agency; Defendants Paul B. Dunbar, Charles W. Crawford, Louis D. Elliott and George P. Larrick are the Commissioner, Associate Commissioner and Assistant Commissioners, respectively, of

the Food and Drug Administration of the Federal Security Agency; and Defendant Tom C. Clark is the Attorney General of the United States; all of the said defendants being officers or agents of the United States Government empowered by the Congress of the United States and by the Federal Security Agency with the due and proper administration of the Federal Food, Drug and Cosmetic Act of 1938, as amended, and having their principal places of business in the District of Columbia.

2. This action arises under the provisions of the Federal Food, Drug and Cosmetic Act *of 1938*, Title 21, U. S. C. Sections 301-392, the Administration Procedure Act, Title 5, U. S. C. Sections 1001-1011, and the Constitution of the United States, as hereinafter more fully appears.

3. Plaintiff is and has been since September, 1945, the exclusive national distributor for a vitamin and mineral food product known as "Nutrilite Food Supplement" which consists of capsules containing a base of a concentrate of alfalfa, parsley, and watercress, fortified with added vitamins, and tablets containing several food minerals. Sales of Nutrilite Food Supplement are made through Plaintiff's distributors direct to consumers and in connection with said sales a booklet prepared by Plaintiff under the title "How to Get Well and Stay Well" is used. Said booklet contains a general discussion of nutrition, the need for vitamins and minerals in nutrition, and the deficiency conditions which can result from a lack of such factors in the diet. The Plaintiff has also made statements and representations concerning the said Nutrilite Food Supplement in labels upon the bottles containing the same, upon the cartons in which the said bottles are enclosed and in said booklet, "How to Get Well and Stay Well". The statements contained in and upon the said labels, cartons and booklets have been prepared with care, under scientific and legal direction, and in the utmost of good faith; no representations have been made thereunder which the Plaintiff and its officers and agents did not believe, and have reason to be-

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lieve, were and are true; and nothing contained therein has been or is false, fraudulent, *or in any respect misleading to the injury or damage of any purchaser or consumer.*

4. The product "Nutrilite Food Supplement" contains no substance or material or combination of substances or materials harmful or deleterious in any manner whatsoever to human users thereof and in fact does contain substances and materials which have been demonstrated by scientific tests and by actual experience of users to be helpful to the health of human beings. No claim has at any time been made by any Federal, State or other governmental agency that Nutrilite Food Supplement is adulterated or harmful in any manner whatsoever to the health of human users thereof.

5. Plaintiff distributes Nutrilite Food Supplement in interstate commerce throughout the United States and, through energetic and resourceful techniques, has developed and expanded its distribution business to a point where it has representatives in each of the forty-eight States of the United States and has, through sound and honest business practices, built up a lucrative trade amounting to more than $500,000 a month *prior to the filing of the seizure actions hereinafter referred to.* Plaintiff further alleges that a very large percentage of its present total volume consists of sales to unsolicited persons to whom Nutrilite Food Supplement has been recommended by users thereof and by other persons not connected directly or indirectly with Plaintiff or its organization. The very nature of Plaintiff's business makes good will its most valuable asset, and Plaintiff states that the good will built up for its products by honest and conscientious effort since their product was first marketed in 1933 makes possible its present success.

6. In the latter part of the year 1946, representatives of the Food and Drug Administration of the Federal Security Agency visited the offices of Plaintiff in the City of Los

Angeles, California, and were furnished, at their request, copies of all literature then used by Plaintiff in connection with the sale of said product, including the then current edition of the booklet entitled "How to Get Well and Stay Well", and in addition thereto, requested and were furnished with names and addresses of certain of Plaintiff's distributors of said product in States other than the State of California.

7. In January, 1947, an Inspector of said Food and Drug Administration visited the offices of Plaintiff at Long Beach, California, and requested and received the names and addresses of additional distributors of Nutrilite Food Supplement, and in particular, distributors to whom shipments of said product had just recently been made and who would therefore most probably have said product on hand at said time and for a number of days thereafter. On the occasion of said visit by said representative of the Food and Drug Administration, additional copies of the booklet "How to Get Well and Stay Well" were voluntarily offered by Plaintiff and without solicitation or request therefor from said representative and at said time Plaintiff requested said representative to advise it if the Food and Drug Administration had any objections to said booklet or the contents thereof. Plaintiff was then and there informed by said representative that so far as he knew, there were no objections thereto and that copies, additional to those previously furnished as alleged in Paragraph 6 hereof, were not needed.

8. In June, 1947, said Food and Drug Administration in Los Angeles, California, addressed a notice to Plaintiff, acting under the provisions of Title 21, Section 335, United States Code, and a hearing pursuant thereto was held in the offices of said Food and Drug Administration in Los Angeles, California in July, 1947. At said hearing it was alleged by representatives of said Food and Drug Administration generally that said booklet "How to Get Well and

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Stay Well" and certain other literature contained objectionable material which, however, were not specified. Notwithstanding the fact that representatives of said Food and Drug Administration made no specification of any purportedly objectionable matter in said booklet and the other literature, the legal representative of Plaintiff at said hearing advised the representatives of said Food and Drug Administration that the objectionable literature would be immediately discontinued and that said booklet would be *revised* in its entirety and revised so as to eliminate any possible objection that might be made by the Food and Drug Administration, and Plaintiff alleges that said Plaintiff did immediately discontinue the use of such literature and took immediate steps toward the revision of said booklet and it was in fact thereafter republished in the revised form in conformance with the views of the Food and Drug Administration as the same were explained to Plaintiff and its attorney. Instructions were subsequently issued to all of Plaintiff's distributors to destroy the old booklets. At said hearing it was also alleged by representatives of said Food and Drug Administration that one of Plaintiff's products known as "B & E" Nutrilite Food Supplement contained a 30% shortage of Vitamin B_1. Thereupon, Plaintiff obtained from the Food and Drug Administration a portion of the specific sample so alleged to be deficient and secured an analysis thereof from a reputable independent laboratory which determined that said deficiency was no more than 5% and could be attributable to the length of time elapsing between the shipment of the tested product and the analysis thereof. Plaintiff alleges in this connection that Vitamin B_1 is a product the potency of which diminishes with the lapse of time. No further charges or hearings with respect to said alleged deficiency of Vitamin B_1 have been made or had to date hereof. At said hearing, representatives of said Food and Drug Administration also stated that the labels used by Plaintiff on said product did not fully comply in certain particulars with the Federal

Food, Drug and Cosmetic Act. Thereupon, Plaintiff immediately revised said labels to meet said objections and said labels have at all times since complied and do now comply with said Act.

9. Following the hearing of July, 1947 referred to in Paragraph 8 hereof, Plaintiff learned that agents of said Food and Drug Administration were interrogating many of Plaintiff's sub-distributors and customers. In order to determine the basis for such interrogations, Plaintiff arranged a meeting with representatives of said Food and Drug Administration in the offices of the latter in Los Angeles, California. At said meeting, the Chief of the Los Angeles station of said Food and Drug Administration was informed by Plaintiff that Plaintiff desired to comply in every respect with every phase of the Federal Food, Drug and Cosmetic Act, and requested said Chief to advise Plaintiff if said investigation and interrogations were prompted by a belief in the minds of representatives of said Administration that any phase of Plaintiff's labels or labeling in any manner or at all violated any provision of law. In reply thereto, said Chief advised Plaintiff that said investigation and interrogations were merely "routine" in nature, and no statement was made by said Chief that any phase of Plaintiff's labels or labeling was suspected of being in violation of the Federal Food, Drug and Cosmetic Act.

Plaintiff alleges that the term "misbranding" is undefined in any provision of the Federal Food, Drug and Cosmetic Act except in general terms as contained in Sections 201(n), 403 and 502 of said Act. (21 U. S. C. §§ 321(n), 343, 352). To the best knowledge of Plaintiff and its attorneys there is no published book or standards which specify with certainty whether labeling or literature is false or misleading. By reason thereof, whether or not criminal or civil proceedings are instituted against any person because of the alleged misbranding of their product depends entirely upon the views, interpretations and policy of said Food and

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Drug Administration as the same then exist, with the consequent uncertainty in the minds of the industry, notwithstanding their conscientious efforts to avoid misbranding, as to whether a product distributed by them will cause said Administration to institute civil or criminal proceedings against them. By reason thereof and with said circumstances in mind, Plaintiff stated to said Chief that should any question arise at any time in the future concerning the alleged misbranding of any product distributed by Plaintiff or in connection with any phase of Plaintiff's business or operations, that said Food and Drug Administration notify Plaintiff thereof immediately, and that upon such notification Plaintiff would do its utmost to comply with the views of the Food and Drug Administration.

10. On September 15, 1948, a secret indictment was returned in the United States District Court for the Southern District of California, Central Division, against Lee S. Mytinger, William S. Casselberry (the two principal stockholders of Plaintiff corporation) and Carl F. Rehnborg, for an alleged violation of the Federal Food, Drug and Cosmetic Act, charging two counts each of misbranding and fraud in connection with two interstate shipments of the aforesaid food product Nutrilite Food Supplement made in January, 1947. The basis for said indictment was certain literature which had been withdrawn from circulation by Plaintiff approximately 14 months prior thereto and the edition of the booklet "How to Get Well and Stay Well" which had been withdrawn from circulation by Plaintiff approximately 5 months prior to the return of said indictment, as more fully set forth in Paragraph 8 hereof, and of which withdrawal the food and Drug Administration had prior notice as aforesaid.

11. Subsequent to the return of said indictment, the Defendants instituted or caused to be instituted and commenced numerous libel actions against certain of Plaintiff's products, and has made or caused to be made without prior notice to Plaintiff seizures thereof at the following locali-

ties and on or about the following dates, in connection with said libel actions:

Belleville, New Jersey	September 30, 1948
New York City, New York	October 14, 1948
Buffalo, New York	October 28, 1948
Hastings, Nebraska	November 24, 1948
Belleville, New Jersey	December 14, 1948
Spokane, Washington	*December 23, 1948*
Seattle, Washington	*December 30, 1948*
Clarkfield, Minnesota	*December 31, 1948*
St. Petersburg, Florida	*January 4, 1949*
Chicago, Illinois	*January 3 and 4, 1949*

Plaintiff has been informed by Defendant George P. Larrick, Assistant Food and Drug Commissioner, that he has approved additional seizures, and based upon such information alleges that further and additional seizures and libels are being contemplated by Defendants. All of the several libels so already instituted in the several States by seizures as aforesaid, and those which are threatened, contain statements which are in substance identical and allege the misbranding of the said Nutrilite Food Supplement, and there are no separate issues of fact or of law which necessitate such numerous libels in the several States and the trial and determination of the several issues involved in any one of the said libels can and will determine the validity of the claims of the Plaintiff in and concerning the said Nutrilite Food Supplement and no necessity exists for harassing the Plaintiff with these numerous filed and threatened seizures and libels.

12. *The libels filed as listed above have already directly caused Plaintiff's business to diminish from a gross volume of over $500,000 per month to a volume of approximately $400,000 per month and said libels have caused great and irreparable damage to the good will of Plaintiff's business and have greatly and irreparably damaged the morale and*

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efficiency of Plaintiff's national distribution organization. If said threatened libels are filed and Plaintiff's product seized thereunder Plaintiff's good will and business will be almost completely destroyed and irreparably injured before Plaintiff can obtain a hearing and adjudication of the lawfulness of its said advertising and labeling under said Act.

13. Plaintiff further alleges that the Food and Drug Administration, through its officers and employees, has caused embargoes to be placed on Plaintiff's products in New York, New Jersey, Washington State and Florida and various other localities in the United States by request to state and local health authorities; that such embargoes have generally been instituted prior to the institution of libel for condemnation proceedings; and that such embargoes are unwarranted and deliberately calculated to interfere with and ultimately destroy Plaintiff's business and good will.

14. Plaintiff alleges that the several packages, cartons and bottles of Nutrilite Food Supplement so seized at various times and places by and under the direction and authority of the Food and Drug Administration, all as hereinbefore alleged, exclusive of the seized booklets, *have a retail value of several thousands of dollars* and are being retained by Defendants or under their authority in the several jurisdictions wherein said seizures were made, and none of said property is available for sale by Plaintiff and cannot be sold while said libels are pending. If Defendants proceed with other seizures as they have threatened to do, a very large percentage, if not all, of Plaintiff's product now in the hands of its various sub-distributors, *numbering approximately 5,000 in all,* will be held by Defendants or under their authority for an indefinite period of time. Vitamin products such as those seized as aforesaid are subject to deterioration and loss of potency by the passage of time, and by the time the respective libel actions can be determined said products will be unsaleable and of no value to Plaintiff even if said libel actions are determined in its favor.

15. The business and good will of the Plaintiff are very valuable and this business and good will are threatened with total destruction by the said arbitrary and illegal action of the several defendants. By reason of the libels which have been brought and the seizures made thereunder, and of the threats of further similar libels and seizures, the business and good will of the Plaintiff is being harassed and destroyed and its property is greatly depreciated.

16. The prosecution of such libels in various courts in widely separated parts of the United States *is deliberately calculated by Defendants to be oppressive and it will ruin and destroy the business and good will of the Plaintiff. Plaintiff further alleges that the institution of the various libels by the Defendants herein in widely separated parts of the United States is unreasonably oppressive and causes great and unnecessary expense to Plaintiff in employing counsel to defend such libel proceedings and that the threatened institution of further seizures in connection therewith will put Plaintiff to further and additional expense which will all result in the destruction of and irreparable injury to Plaintiff's business and good will. If such libels be prosecuted in* widely separated parts of the United States and in different jurisdictions, the business of the Plaintiff will be wholly broken up and its good will and its property completely destroyed prior to any adjudication of the merits of the claims of the Plaintiff or of the claims of Defendants with respect to Plaintiff's alleged misbranding of its said product. Furthermore, there is no provision of law requiring or permitting said Food and Drug Administration to reimburse Plaintiff for the loss of said product in the event af a determination of said libel actions in favor of Plaintiff and there is no provision for payment to Plaintiff for damages incurred through destruction of its business and good will by the actions of the Defendants.

17. Title 21, Sec. 334(a), of the United States Code, prohibits the institution of more than one libel for condemna-

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tion based upon the same alleged misbranding unless the Administrator has probable cause to believe from facts found without a hearing by him or any officer or employee of the Federal Security Agency that the alleged misbranded article is dangerous to health or that the labeling thereof is fraudulent or would in a material respect be misleading to the injury or damage of the purchaser or consumer, or unless such alleged misbranding has been the basis of a prior judgment in favor of the United States in a criminal, injunction or libel for condemnation proceeding under said Statute. *Plaintiff alleges that there has been no judgment in favor of the United States in any proceedings against Plaintiff, and that its product Nutrilite Food Supplement is not dangerous to health and that the labeling and advertising thereof is not and never has been fraudulent or misleading in any respect to the injury of any person.*

18. Plaintiff alleges:

A. *That the Administrator of the Federal Security Agency was twice requested to grant it a hearing prior to his determination that there was probable cause to believe that Plaintiff's product was misbranded, which determination, under Section 304(a) of the Federal Food, Drug and Cosmetic Act, is a condition precedent to multiple seizures. In said written requests, Plaintiff stated that if officials or employees of the Food and Drug Administration requested said Administrator to make a determination that the advertising and labeling of Plaintiff's product were misleading in a material respect to the injury of purchasers or consumers thereof, Plaintiff most respectfully prayed that said Administrator grant it a hearing so that Plaintiff could present to him the full and true facts showing that the labeling of Nutrilite Food Supplement is not misleading in any respect. The Administrator was further advised that the consequences of an erroneous*

decision on the issue of probable cause would be that Plaintiff would be put out of business completely and irreparably damaged by the multiple seizures so authorized and threatened by Defendants prior to any possible opportunity Plaintiff might have to defend itself against said erroneous decision. The Administrator twice denied this request for a hearing and made an ex parte determination that Plaintiff's labeling for its product, Nutrilite, is misleading. The United States District Court for the District of Columbia has held that the language of Section 304(a) of the Act requires no such hearing by said Administrator prior to said probable cause decision.

B. *Plaintiff's product Nutrilite Food Supplement is not dangerous, deleterious or harmful to the public health or welfare and the experience of thousands of users prove that it is in fact extremely valuable as a health aid. Plaintiff's advertising and labeling is not in a material respect misleading to the injury or damage of purchasers or consumers thereof, and said ex parte decision of probable cause of said Administrator is erroneous in so concluding. There is no emergency requiring summary action against Plaintiff's product and Defendants have had and now have an adequate time within which they can grant Plaintiff a hearing, during which said time no person will be injured in any way. No person would be injured in any way if Defendants are enjoined from instituting further libel actions and from proceeding with other libel actions already filed until the first libel action listed above is finally determined.*

C. *Because of the failure of Section 304(a) of the Act, as interpreted as aforesaid, to provide for a hearing as a condition precedent to multiple seizures of its product under the facts set forth in this Complaint Plaintiff further alleges that Section 304(a) of said*

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Act is unconstitutional in that said section as interpreted denies to Plaintiff the due process of law guaranteed by the Fifth Amendment to the Federal Constitution.

D. *Plaintiff will be injured as set forth in this Complaint in that its business, good will and property will be irreparably damaged in the particulars set forth herein by the multiple seizures instituted or caused to be instituted by Defendants prior to a hearing in any of the multiple libel actions instituted by Defendants against Plaintiff and prior to any possible adjudication of the question of Plaintiff's compliance with labeling requirements of the Food, Drug and Cosmetic Act of 1938 in said libel actions. The extent of said irreparable injury would be increased many times if Defendants institute the libel actions threatened by Defendants and Plaintiff's business, good will and property will be completely destroyed prior to any possible adjudication in any of the libel actions on the merits of Plaintiff's labeling of its product Nutrilite Food Supplement.*

19. Plaintiff further alleges that the Food and Drug Administration, arbitrarily and for no legal, practical or other reason, refuses to stipulate with Plaintiff so as to permit the removal of the existing libels to the United States District Court, Southern District of California as provided for in the Federal Food, Drug and Cosmetic Act, so as to permit Plaintiff to try the issues involved in such libel proceedings at a location where witnesses are available to Plaintiff and where Plaintiff can make a complete defense to such actions. Plaintiff further alleges that representatives of the United States Department of Justice have expressed their willingness to stipulate to the removal of the existing and pending libel actions to the Southern District of California, which is a District of reasonable proximity to the principal place of business of Plaintiff, to wit: the

Southern District of California, but that said United States Department of Justice has refused and will continue to refuse to so stipulate unless and until approval to such stipulation is obtained from the remaining Defendants, and that said remaining Defendants do now refuse and at all times herein mentioned have refused to authorize such a stipulation by the Defendant Tom C. Clark, Attorney General of the United States, and that said refusal deprives Plaintiff of the opportunity of producing witnesses available to testify to competent, relevant and material facts in said libel proceedings and thereby deprives plaintiff of its opportunity adequately to defend said libel proceedings and each of them. Plaintiff further alleges that notwithstanding the fact that said libels for condemnation and each of them are as provided by law under the control of the Defendant Tom C. Clark, Attorney General of the United States, and that said representatives of said Attorney General have as aforesaid expressed their willingness to stipulate for the removal of said libel proceedings to the United States District Court, Southern District of California, which is a District of reasonable proximity to plaintiff's principal place of business, nevertheless, representatives of said Food and Drug Administration unreasonably, arbitrarily and capriciously refuse to consent to such stipulation for such transfer notwithstanding the fact that said representatives of said Food and Drug Administration have admitted to Plaintiff that by reason of the great distances existing between the Districts of the United States District Courts in California and adjoining States, great hardship, inequities and great expense would be thereby thrust upon Plaintiff.

20. Plaintiff further alleges that in addition to the duties and responsibilities of the Defendants with respect to the administration and enforcement of the Federal Food, Drug and Cosmetic Act, Defendants have deliberately *and arbitrarily* pursued and instituted a course of enforcement against Plaintiff herein which is designed solely toward

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the harassment of Plaintiff and the complete and total destruction of their business and good will.

21. Plaintiff further alleges that the Defendants have pursued, are pursuing or have caused to be pursued a course of enforcement of the Federal Food, Drug and Cosmetic Act, over and beyond their prescribed statutory duties, which are designed to harass and to ruin Plaintiff's business and good will prior to any adjudication of the merits of Plaintiff's labels and labeling.

22. Plaintiff alleges that under the provisions of Section 1009(e), Title 5, U. S. C., the Administrative Procedure Act of 1946, *it is entitled to have the determination of* the Administrator of the Federal Security Agency that the Plaintiff is employing misleading labeling in connection with the sale of its product, judicially reviewed, declared void and set aside because it is arbitrary, *capricious,* unreasonable *and unlawful,* because it is not founded upon and *proper* facts, and because such *determination* under the facts herein alleged deprives Plaintiff of his property without due process of law in violation of the Fifth Amendment to the United States Constitution.

23. Plaintiff neither desires to delay nor impede any proper administrative or judicial determination of the disputed questions of fact presented in the controversy with the Food and Drug Administration over the labels and labeling of Plaintiff's said products, but is hereby merely seeking to protect its property from multiple seizures and its business and good will from complete destruction until judicial determination of said questions can be had.

24. *Plaintiff alleges that it has no plain, adequate or complete remedy at law to prevent the injury and threatened injury complained of herein.*

25. *All libels instituted by Defendants after the first libel which was filed in New Jersey as aforesaid and all seizures thereunder are unlawful and void because the Administra-*

tor of the Federal Security Agency has not lawfully performed the necessary conditions precedent of making a decision of "probable cause" as the basis for the multiple seizures described above and threatened by Defendants, said decision of the Administrator being required by Section 304(a) of the Food, Drug and Cosmetic Act.

26. *The Defendant Tom C. Clark, as Attorney General of the United States, is responsible for the institution of the multiple libel actions described herein and threatened in the future as the United States District Attorneys who have filed and who will file said actions have acted and will act under his direction. Said actions other than the first libel action described above are illegal and void and have been instituted by joint action of the Defendants in violation of Section 304(a) of the Food, Drug and Cosmetic Act and the Fifth Amendment to the Constitution of the United States, and in excess of the lawful authority of said Defendants.*

WHEREFORE, Plaintiff prays the Court:

1. That it take jurisdiction of this case, and cause appropriate process to issue against the Defendants and each of them, and require the Defendants to answer this Complaint, as provided by the rules of this Court and the law.

2. That pending hearing herein, this Court forthwith cause to be issued a temporary restraining order in accordance with the rules of this Court *and Title 28 United States Code, Section 2284(3)*, restraining the Defendants and each of them, their agents, servants, employees and attorneys and all persons in active concert and participation with them, from instituting or causing to be instituted further libel actions against or seizures of Nutrilite Food Supplement until a hearing can be had on the temporary injunction prayed for herein.

3. That Defendants and each of them, and their successors in office and all persons acting or claiming to act under

their authority, or by their direction, be restrained and enjoined temporarily, *pending the final judgment herein,* from continuing or causing to be continued the prosecution of any of the pending libel actions referred to in this Complaint, other than the first libel action referred to herein, and from instituting or causing to be instituted further libel actions against or seizures of Nutrilite Food Supplement *until the final judgment herein.*

4. *That it find and decree all libel actions herein described, other than the first said libel action, illegal and void.*

5. *That it order Defendants to vacate, withdraw and dismiss all libel actions, herein described, other than the first said libel action.*

6. *That Defendants be enjoined from proceeding in any of the libel actions described herein, other than the first libel action, until there is a final judgment in said first libel action.*

7. *That Defendants be enjoined from instituting or causing to be instituted further libel actions against or seizures of Nutrilite Food Supplement until there is a final judgment in said first libel action.*

8. *That the decision of probable cause made as described herein be held and declared to be illegal and void.*

9. *That, upon the final hearing of this cause, this Court find and declare that the multiple seizure provisions of Section 304(a) of the Federal Food, Drug and Cosmetic Act of 1938, as applied to the Plaintiff under the facts set forth in this Complaint, are unconstitutional in that they deprive the Plaintiff of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.*

10. That Plaintiff be granted such other, further and general and special relief as the nature of the case may re-

quire and the Court may deem proper and just in the premises.

Respectfully submitted,

WILLIAM S. CASSELBERRY, *President,*
MYTINGER AND CASSELBERRY, INC.,
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EUGENE J. BRADLEY,
LESTER L. LEV,
Attorneys for Plaintiff.

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649 South Olive Street,
Los Angeles, California.

District of Columbia, ss:

WILLIAM S. CASSELBERRY, being first duly sworn upon oath says that he is President of Plaintiff corporation, that he has read and is familiar with the foregoing complaint; that he is familiar with the facts therein set forth and that such facts are true except as to matters alleged upon information and belief, which matters to the best of his information and belief are true.

(s) WILLIAM S. CASSELBERRY.

Subscribed and sworn to before me this 4th day of March, 1949.

(s) BRICE W. RHYNE,
(Notarial Seal) *Notary Public, D. C.*

My commission expires December 18, 1950.

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Office - Supreme Court,
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CHARLES ELMORE CROP
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No. 597, Misc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

IN THE MATTER OF THE PETITION OF THE FEDERAL SECURITY ADMINISTRATOR AND THE ATTORNEY GENERAL FOR WRITS OF PROHIBITION AND/OR MANDAMUS.

ANSWER OF INTERVENOR, MYTINGER AND CASSELBERRY, INC., TO PETITION OF FEDERAL SECURITY ADMINISTRATOR, ET AL., FOR WRITS OF PROHIBITION AND/OR MANDAMUS.

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ANSWER OF INTERVENOR TO PETITION OF FEDERAL SECURITY ADMINISTRATOR, ET AL.

Now comes Mytinger and Casselberry, Inc., Plaintiff in the case of Mytinger and Casselberry, Inc. v. Ewing, et al., No. 5208-48, District of Columbia, under leave granted by this Honorable Court on May 9, 1949, and replies to the Petition of the Federal Security Administrator and the Attorney General for Writs of Prohibition and/or Mandamus as follows:

1. Paragraph 1 is admitted.

2. Paragraph 2 is admitted.

3. Paragraph 3 is admitted in part, with the following qualifications:

Examination of the records of Petitioners pursuant to the order of the Special Court granting authority for such examination reveals that the Petitioners have prepared the papers for the libel actions in Washington and have sent them to the various district attorneys with a request that they be filed and that "immediate seizure" be made of Intervenor's product; all responses to the various libel papers are also handled directly by the Petitioners in Washington. The various district attorneys have been forbidden to agree to consolidation and removal of the cases to the Federal District courts in San Francisco or Los Angeles. Further, the various libel papers have been prepared and sent out in mimeographed form so that Petitioners were preparing to and are in a position to make many new seizures in the same way with all possible speed throughout the Nation. The files of Petitioners further reveal statements that "the Administration has underway a multiple seizure program" against Nutrilite Food Supplement, as a part of which they are interrogating users and distributors of the Intervenor's product all over the United States.

4 and 5. Paragraphs 4 and 5 are admitted with the following essential explanation: The first seizure action was made on September 30, 1948. Seizures were then made in New York City on October 14, 1948, and in Buffalo, New York on October 28, 1948. In each of these first three cases the libel papers claimed that certain testimonials published on pages 37 through 58 in the then current 58-page edition of the advertising pamphlet "How to Get Well and Stay Well" were misleading. The Intervenor then sent telegrams to every person having a copy of said booklet instructing them to take these pages out of said booklet and continue selling its product by use of *the remaining 36 pages which Petitioners had not questioned.* Although Intervenor disagreed with the Petitioners' contentions as to pages 37 through 58, it thought it should, in

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good faith, not use anything attacked by the Petitioners.

The next move of Petitioners was the seizure action in Hastings, Nebraska on November 24, 1948, based on a claim that the remaining 36 pages are misleading. This seizure was in direct violation of an agreement by the Petitioners file no further seizure actions until determination by the Supreme Court of the United States of the case of *Kordel* v. *United States,* No. 30, 1948 Term, decided Nov. 22, 1948. (See affidavit of Casselberry, filed as an exhibit to the original complaint). In their affidavits the Petitioners now contend that they only intended the agreement to mean that they did not intend seizures in the Los Angeles District. (Larrick affidavit, filed by Petitioners, Paragraph 14). The further seizures in Clarkfield, Minnesota and Spokane, Washington, were then made, based upon the claim that this 36 page booklet was misleading.

The seizures in St. Petersburg, Florida and in Seattle, Washington and the second seizure in Belleville, New Jersey were based upon the 36 page pamphlet with 8 added pages, which is the current booklet in use. The two seizures in Chicago, Illinois (and there are two instead of one as indicated) are based upon both the 36 and 42 page booklets.

In each libel case Intervenor has employed local counsel, filed an answer, posted a bond for costs, and done all things necessary to get each case ready for trial. No motion to consolidate and remove was filed prior to the filing of the injunction action because Intervenor could not be sure but what there would be an untold number of new seizure cases, as Petitioners had, in discussing the claim of violation of the agreement not to make more seizures, advised of their intention to make more seizures. (Complaint, paragraph 11). It would not do any good to consolidate the pending cases and then have other cases and other motions to consolidate such cases follow swiftly thereupon. A motion to consolidate and remove has been filed in New Jersey together with a motion to dismiss these actions as illegally instituted under the decision of

Judge Pine so holding (See transcript of hearing, Jan. 24, 1949). These motions were scheduled to come up for hearing but were delayed at the request of the Assistant District Attorney, who wanted to find out whether Petitioners wished to send someone from Washington to argue the motions. In the meantime the Special Court entered its order on April 6, 1949, and Counsel for Intervenor suggested to the District Attorney that the matter be held in abeyance by mutual consent, and that is the status of the motion now.

6. Intervenor admits the first sentence of Paragraph 6. The other statements in said paragraph are incorrect and Petitioners are well aware of this. For example, it is claimed in this paragraph that the booklet mentions chronic conditions "which may well be diabetes or cancer" but Petitioners' own doctor, Dr. Robert C. Butz, in the deposition he gave, testified as follows:

> "Q. What is your understanding of the word 'chronic', Doctor?
>
> "A. 'Chronic' is a condition that exists for a period of time in contrast with acute. You could have a chronic condition which would flare up and be acute. But 'chronic' usually implies that it exists over a longer period of time than is ordinarily found in diseases. For instance, if you have a cold that lasts a week, that is acute. If it lasts a period of months it would be chronic." (Deposition of April 25, 1949, pages 27-28)
>
> "Q. Doctor, do most doctors bring about an immediate improvement in patients with chronic ailments?
>
> "A: No, unfortunately.
>
> "Q. I believe you said earlier when you referred to chronic ailments you include things other than, say, the incurables like cancer—
>
> "A. I include everything in chronic diseases.
>
> "Q. It is a broad term?
>
> "A. Chronic diseases refers to those diseases which you have over a prolonged period of time.
>
> "Q. Well, if somebody uses the word 'chronic', you don't understand by that, that they are referring to cancer, is what I mean?

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"A. Not necessarily, no." (Deposition of April 25, 1949, pages 64-65)

The booklet is devoted entirely to a discussion of deficiency diseases brought about by lack of proper diet. The booklet discusses the symptoms of the various deficiency diseases and the vitamins which are of assistance in preventing deficiency diseases. The booklet repeatedly states that Nutrilite will not cure anything. At no place therein is there the representation claimed by Petitioners that Nutrilite will cure tuberculosis, cancer, heart disease, glandular and nervous disorders or the ills that commonly affect mankind. Said statement has no basis whatever in fact and is evidently designed as a use of the "scare" technique in the hope of prejudicing the Court against Intervenor.

On the statement about experimentation with health before consulting a physician, the booklet does just the opposite, as it repeatedly suggests consultation with physicians. That the Petitioners have *no evidence whatever* that Nutrilite has injured or damaged any person has been clearly brought out in the depositions taken of Petitioners' officers and employees to date in which such fact is admitted. An examination of the files of Petitioners reveals that not one single user has complained to the Petitioners about Nutrilite—a most remarkable situation in view of the thousands of users of the product. Answering further, Intervenor states that the Petitioners have made unsupportable statements similar to those in Paragraph 6 before the Three-Judge Court, yet they now vigorously oppose that Court's inquiring into the truth of the statements made by Petitioners even though such statements are related to the issue of oppressive exercise of authority herein.

Intervenor further cites repeated admissions by Petitioners in the several arguments, transcripts of which are on file in this Honorable Court, that its product, "Nutrilite Food Supplement" is non-toxic and non-dangerous. Peti-

tioners likewise admit in their answer that Nutrilite is absolutely harmless. (Answer, par. 4).

7 and 8. These paragraphs are not an accurate statement of the original complaint and the relief there prayed. That complaint affirmatively states that prior to the current litigation the booklet was, after criticism from Petitioners, republished in "revised form in conformance with the views of the Food and Drug Administration as the same were expressed to Plaintiff and its attorney." (Paragraph 7.) The Complaint sets forth in detail the oppressive harassment and unlawful and arbitrary conduct of the Petitioners as far as then known to Intervenor and none of these facts are set forth in Paragraph 8 by the Petitioners. Intervenor admits that the original Complaint, unlike the amended Complaint, did set forth in Paragraph 13 thereof many allegations about lack of information about the Administrative action taken by Petitioners. The decisions authorizing multiple seizures which were made by Petitioners on September 30, 1948, December 2, 1948, and December 9, 1948, were made *secretly* and no copy thereof was served upon Intervenor until January 17, 1949, when they were attached to the first motion of the Petitioners herein.

9. This paragraph is not an accurate statement of the facts because Judge Pine in denying Petitioners' motion to dismiss, as the order itself shows, did not deny Intervenor's motion for a temporary injunction. Judge Pine in fact stated he would grant the injunction if it was necessary to protect Intervenor from Petitioners, but Petitioners agreed to make no seizures rather than have the injunction issued against them.

10 and 11. The amended Complaint makes substantial changes from the facts alleged in the original Complaint. These changes state new facts and restate other allegations in the light of the facts brought out in the January 24 and March 3 hearings before Judge Pine and in the papers,

affidavits and representations made by the Petitioners which revealed some of the administrative action taken, and which action indicated further oppressive acts or action designed to irreparably injure Intervenor. Contrary to the Petitioners' statement that the only substantial changes are in Paragraphs 18 and 24-26, attention is called to the six additional seizures set forth in Paragraph 11 of the amended Complaint; the entirely new paragraph 12 of the amended Complaint, alleging a sales loss of $100,000 per month from Petitioners' unlawful actions and great and irreparable damage to the good will of Intervenor's business and to the morale of its national distribution organization. In the same paragraph is the statement that if the threatened libels are filed Intervenor's good will and business will be almost completely destroyed and irreparably injured before Intervenor can obtain a hearing and adjudication of the lawfulness of its advertising and labeling in any of the libel actions; in paragraphs 14 the number (approximately 5,000) of distributors selling Intervenor's product is set forth for the first time; in paragraph 16 it is alleged that the prosecution of the seizure actions by Petitioners in widely separated parts of the United States "is deliberately calculated by Defendants to be oppressive"; paragraph 18 is completely new showing 2 denials of a hearing and other arbitrary and oppressive action of Petitioners; paragraph 24 through 26 and prayers 4 through 9 are new—all setting forth new facts and contentions on the issues of oppressive abuse of power and unconstitutional action by Petitioners.

The action of Judge Tamm in granting the temporary restraining order on February 24 was made upon consideration of the facts found and set forth in that restraining order showing irreparable injury to Intervenor—facts which Counsel for Petitioners, who was present at the time the restraining order was granted, admitted were true even though he did vigorously oppose the granting of the temporary restraining order.

At the argument on April 6 before the Special Court, Counsel for both sides argued the constitutional question, although the transcript reveals that Counsel for the Intervenor advised the Court that he was relying in addition upon relief from the arbitrary action of the Petitioners and that he did not wholly agree to the Petitioner's contentions about Judge Pine's decision and the law of the case created thereby. (Transcript, pp. 45, 47, 51, 55, 58, 60.) Attention is called to the following at page 55 of the Transcript of the Argument:

> "JUDGE GOLDSBOROUGH: Did Judge Pine hold that the words 'without hearing,' allow the board to make decisions to act arbitrarily and not in good faith, and with no recourse to be had to the courts to correct that situation? Is that what he held?
>
> "MR. KLEINFELD: *The only issue threshed out before Judge Pine was that the statute required, really required a hearing, and if the Administrator did not give a hearing he was therefore acting arbitrarily.* That was the entire substance of plaintiff's complaint.
>
> "JUDGE GOLDSBOROUGH: *Then Judge Pine hasn't passed on the question of whether or not if the action of the Administrator was arbitrary and capricious and not in good faith that no remedy could be successfully gotten from a court, on injunctive process.*
>
> "MR. KLEINFELD: Well, words of that general character were contained in the original complaint. Plaintiff's original complaint was long, contained very many allegations and conclusions." (Italics supplied.)

It is therefore clear that Judge Pine did not, by the admission of Petitioners' own counsel, pass directly upon the issue of arbitrary abuse of power by Petitioners.

Intervenor did not understand that the Petitioners' Motion to Dismiss and the granting of the temporary restraining order had anything to do with any suggestion as to a stipulation. It is the understanding of Intervenor that the Court denied the Motion to Dismiss and granted a temporary restraining order and that the restraining order

was intended solely to keep the matter in *status quo* until the Court could receive evidence before passing upon the motion for a preliminary injunction. It was also not the understanding of Intervenor that the trial on the merits was to be confined in any way to the question as to whether the booklet (or labeling) was misleading. The unfortunate illness of Judge Goldsborough prevented the hearing on April 11th, at which Counsel for the parties were to be informed with respect to the Court's views.

12. In response to Paragraph 12 Intervenor states that the excerpts from the pretrial transcript quoted in this paragraph are not an accurate statement of the understanding which Counsel had of the issues which would be before the Three-Judge Court at the trial scheduled for May 9. It was the understanding of Intervenors that the issue of whether the booklet or labeling was misleading was a part of the broader issue of oppressive, harassing, arbitrary and unlawful conduct of Petitioners, which conduct in itself denied Intervenor due process of law.

That counsel for the Petitioners likewise understood this matter is shown by a statement made at the argument on the Motion to Quash Subpoenas before Judge Clark on April 19, when Judge Clark stated in part at page 11 of the Transcript:

> "JUDGE CLARK: . . . Since there has been an amended complaint filed, we think we not only have the question of constitutionality but also the question of oppressive use of what may be a constitutional process in force.
>
> "That is what we want to be enlightened on.
>
> "In that view it seems that the complainant is entitled to take evidence.
>
> "MR. GOODRICH: We do not dispute that."

No request by the Petitioners for a pretrial order has ever been communicated to Intervenor or to the Court to Intervenor's knowledge. No pretrial order as such was possible prior to the filing of the answer of Petitioners, which answer had not been filed at the time of the informal

pretrial conference discussion before Judge Tamm on April 13.

13. This paragraph, like the excerpts in paragraph 12, gives the wrong impression of the informal discussion at the Pretrial Conference. Counsel for Intervenor did understand this *Conference* to be an informal discussion rather than the usual formal *pretrial hearing*. It was held in chambers rather than in open Court and in reading the Transcript, great leniency is required because of this informality. Also, Counsel were summoned rather hurriedly and no opportunity was given to prepare in detail as in the case of the usual Pre-trial formal hearing. An examination of the transcript shows that Judge Tamm advised Counsel that the Court, in issuing the restraining order, "Did not act solely upon the constitutional question involved, but attempted to consider the complaint and the answer (Defendants' affidavits) upon the basis of the merits of the cause." The Court then further stated:

> "The Court consequently issued a restraining order rather than a temporary or permanent injunction in a desire to continue the status quo and *notify counsel that the three-judge court would go beyond the constitutional question and consider the case on its merits, so that everyone would come to Court with a full understanding of all the Court was going to consider.*"

It is to be noted from an examination of the transcript that it was Counsel for Petitioners' constant discussion of the booklet which kept the informal discussion on that item rather than the broad issues which the Court mentioned from time to time. Failure of Judge Tamm to carefully relate the misleading character of the booklet to the issue of oppressive abuse of power each time he referred to the booklet certainly did not lead Counsel for Intervenor to believe that he could fail to prove all the other allegations in the Complaint on that broad issue and still prove a full case on the merits as indicated at the Pre-trial Conference. In addition to the statement of the Court

just referred to, the Court on pages 9 and 10 pointed out that the Court considered that the amended Complaint brought before it "all the issues raised by the entire pleading of the amended complaint." These issues involve the booklet as the Petitioners have constantly used the booklet as an alleged justification of their oppressive, arbitrary and unlawful action and *in fact seemingly used said booklet to direct attention away from the broader issue.*

It is not believed that the lifting of excerpts of statements by the Court made during the course of this informal conference is a fair representation of the understanding which all Counsel secured from the pretrial conference as to the issues to be tried. The statement of Petitioners' counsel, Mr. Goodrich, which is quoted above, indicated that the present position of Petitioners, and Petitioners' claim that the Three-Judge Court will try the character of the booklet as a separate issue rather than as a part of the broad issue of oppressive and abusive conduct of Petitioners, is not the understanding of all of Petitioners' Counsel as Mr. Goodrich also represented Petitioners at the pretrial conference.

14. In response to this paragraph Intervenor believes that the best and complete answer is that found in the transcript of the argument and the full text of the order which was signed. It is to be noted that this order gives equal opportunities to both parties to examine officers and employees of the other party as witnesses and to examine the records of the other party to discover evidence with all questions as to admissibility properly reserved to the trial. Petitioners bring the last part of their sixth point in the motion up to point number one in restating the Motion in their Petition in the evident hope of persuading the Court that authority was given to probe the mental processes of the Administrator. The record clearly indicates that the only authority given was that of the taking of depositions for the purpose of discovery of records and

development of evidence with all questions as to propriety and admissibility of the evidence developed to be passed upon at the trial. The subpoenas to subordinate employees were not identical with the subpoena to Mr. Ewing to which the motion was addressed.

15, 16 and 17. These paragraphs constitute legal arguments rather than factual statements, all of which arguments are answered in detail in the brief entitled "Plaintiff's Points and Authorities in Opposition to Defendants' Motion to Dismiss", a copy of which has been filed herein for each member of the Court, attached to the Motion for Leave to Intervene. Because of the short period of time which is available Intervenor does not herein undertake to answer point by point the errors in the arguments made in these three paragraphs but relies upon said brief as its answer.

18. The brief referred to in response to paragraphs 15, 16 and 17 in part answers the legal contentions made in paragraph 18. In addition, the product of which Intervenor is now the national distributor has been sold since 1933 and the Larrick affidavit attached to Defendants' Motion to Dismiss states that this business has been under supervision by Defendants since 1939. The same affidavit claims that the booklet used in 1939 to sell Intervenor's product is subject to the same criticism as the booklet now in use. Why Defendants waited ten years to move against the product on the basis of the alleged misleading character of the booklet is unexplained. Certainly, under such circumstances, Petitioners now show no impelling public necessity for speed. Any possible error which might be made by the Three-Judge Court could be corrected upon appeal long before any such period of time would elapse. As stated above, *the officials and employees of the Petitioners whose depositions have been taken have admitted that they have no evidence of any injury or damage to any member of the purchasing public from Nutrilite or the booklet used*

in selling said product. These officials do claim that in their "opinion" the booklet is misleading and it "might" possibly cause injury or damage to purchasers of the product who buy after reading it, but they have no evidence whatever to back up their opinion. The Amended Complaint specifically alleges that a very large percentage of Intervenor's sales are to persons who buy because of favorable recommendations of users (Paragraph 5) and *this "large percentage" could not possibly be injured or damaged by the booklet as they never see it at all.*

The position of the Petitioners in this paragraph of again attempting to argue about the contents of the booklet, yet at the same time insisting that the Three-Judge Court cannot determine the truth of their charges against it, as a part of the other issues in the case, creates a situation where Petitioners are claiming the right to condemn with the further right that no one can question what they say!

WHEREFORE, the Intervenor respectfully prays that:

1. The writ of prohibition prayed for be denied because the Three-Judge Court is exercising a jurisdiction which it has in holding a trial to receive evidence on the issues of (A) Constitutionality of the multiple seizure section of the Food, Drug and Cosmetic Act in denying Intervenor a hearing before its property is destroyed and its business irreparably injured by multiple seizure actions for which injury Intervenor has no adequate remedy in the libel cases or in any other place other than this Special Three-Judge Court and (B) oppressive, arbitrary and unlawful conduct of the Petitioners as a denial to the Intervenor of the due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. The fact that Petitioners have themselves injected the issue of the character of the booklet used to sell Nutrilite Food Supplement as a claimed defense to said broader issues does not deprive the Three-Judge Court of jurisdiction to consider

the issues, as they involve that booklet simply because the libel courts may be required to examine that booklet on another more narrow issue.

2. That the request for a writ of mandamus be denied because the jurisdiction of the Three-Judge Court is not limited solely to determining whether Section 304(a) of the Food, Drug and Cosmetic Act is invalid as applied to Intervenor under the facts in this case, because it allows the making of decisions inflicting irreparable injury "without a hearing". Having acquired jurisdiction to try this substantial constitutional issue the Three-Judge Court can and should hear all other issues in the case.

Respectfully submitted,

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NO REASONS OF LAW OR FACT JUSTIFY ISSUANCE OF THE EXTRAORDINARY WRITS REQUESTED BY PETITIONERS.

I. Petitioners' Interpretation of the Legislative History of the Act is Misleading and Inaccurate

The initial reason assigned by Petitioners for granting the writs prayed for is that the statutory scheme of the Federal Food, Drug and Cosmetic Act of 1938 did not provide the District Court with jurisdiction to determine whether or not Intervenor's labeling was misleading. Through the clever device of quoting from inapplicable phases of the legislative history of the Act, they attempt to show that the words "without hearing" are founded upon an explicit Congressional intent.

Primarily, it should be observed that the Petitioners' brief endeavors to convey the impression that the words "without hearing" were included in the Act as a part of the entire deliberation and consideration by Congress of the Act. Realities fail to sustain this position, and in the paragraphs to follow, it will be undeniably demonstrated that the words "without hearing" were inserted at the very last possible minute by the Conference Committee which was appointed to reconcile the difference in the versions of the bills as passed by the Senate and by the House of Representatives. The legislative history of these particular words, it will be shown, begins with their appearance in the Conference Report—the report of the *75th* Congress on the Bill which became the Federal Food, Drug and Cosmetic Act of 1938.

Before directing this Honorable Court's attention to the details of the "last minute" unexplained and unnoticed inclusion of the words "without hearing" as well as of the phrase ". . . in a material respect misleading to the injury or damage of the purchaser or consumer" it should be observed that in footnote 2 on page 18 Petitioners' brief quotes from a House Report of the *74th* Congress—the Congress which did *not* adopt the Bill. This report was based upon a bill which was before the 74TH CONGRESS, and as this Court well knows, all legislation pending at

the adjournment of a session of Congress, dies with such adjournment. The 75TH CONGRESS enacted the Federal Food, Drug and Cosmetic Act of 1938—not the 74th. References to reports considered by prior Congresses without adequate explanation can only serve or tend to convey erroneous impressions. When Petitioners erroneously cite the old report of the 74th Congress as "The House Report" and then say in the very next sentence "And finally the Conference Committee inserted the words 'without hearing' . . .," they are giving a most erroneous impression. The Report of the House upon the Bill of the 75th Congress which, as amended in Conference, actually became law is House Report No. 2139, 75th Congress. Moreover, such an impression is doubly prejudicial and damaging in view of the recitation of the facts hereinafter which show that these particular words, "without hearing" as well as the phrase in a material respect misleading *"to the injury or damage of the purchaser or consumer"* have no legislative history until the 75th Congress, when as aforesaid they appeared for the first time in the Conference report. The legislative history in this case in this particular is far more informative through its silence or failure to disclose a specific Congressional intent than for that which it does disclose.

For the 5-year period from 1933 to 1938, Congress was considering appropriate legislation to replace the Federal Food and Drugs Act of 1906. During this period many varying measures were introduced; many revisions and amendments were accepted and rejected; many Committee and sub-committee hearings were conducted; and many debates took place on the floors of the Senate and House of Representatives.

But, notwithstanding active and intensive consideration of the various drafts of the bills during this 5 year period, not a single draft contained the words "without hearing" or the phrase in a material respect misleading "to the injury or damage of the purchaser or consumer" which now appear in the multiple seizure provisions of the Federal Food, Drug and Cosmetic Act of 1938. There is not the

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slightest suggestion in the legislative history of this Act that such words existed prior to the report of the Conference Committee referred to above, which was submitted by such Committee several days prior to the final Congressional approval of the Act. After five long years of frequent debate and compromise, the crucial words "without hearing" appeared only in the Conference report which came out at the last minute.[1]

It should also be observed in connection with the appearance of these words in the report of the Conference Committee that neither the Senate nor the House versions of the measure which were passed by the 75th Congress and sent to Conference, or for that matter neither the versions which were before any of the previous Congresses, contained any language which remotely approached that which cropped up most hastily and unexpectedly in the Conference report for the first time. The legislative annals reveal that the major debates did not take place on the Conference report of the 75th Congress—they took place upon the other Bills introduced in the respective houses of Congress, and which, as noted above, were silent as to this phraseology.

Perhaps of equal significance with this apparent afterthought of inserting the words and phrase quoted above is the fact that when the Conference Committee's report was presented to the Congress, not the slightest effort was made by the sponsors of the bill, or the conferees themselves, to explain their inclusion to the members of the two houses either in the report or on the floor of Congress.

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[1] The dates upon which the conferees were appointed, upon which the Conference Committee agreed on the final language, upon which their report was submitted, and upon which it was accepted are most revealing. On June 2 and 3, 1938, the Senate and House conferees, respectively, were appointed. 83 Cong. Rec. 7955, 8169. On June 10, 1938, the conferees agreed upon the manner in which the differences would be settled. On that same day, the Senate received the Conference Report and adopted it. 83 Cong. Rec. 8731. No one could seriously contend that any of the Senators, except those on the Conference Committee, knew of the existence of the words "without hearing" as they did not see or hear the text of the bill until it came out the next day in the Congressional Record as inserted by Senator Copeland at the time he asked for the vote approving it. On June 11, 1938, the Conference Report was submitted to the House of Representatives and on June 13, 1938, it was there accepted. 83 Cong. Rec. 9087, 9095-9101.

Both houses speedily accepted the report, and it became the law of the land.

It cannot be said with accuracy, therefore, that Congress had lent the same painstaking and careful deliberation to the inclusion of the words "without hearing" and the phrase in a material respect misleading "to the injury or damage of the purchaser or consumer" in setting up the statutory scheme as it had to the various other aspects of the Act. Such a contention is completely rejected by the significant silence of the legislative history of the Act respecting this particular verbiage, and the circumstances which surrounded its adoption.

Petitioners conclude their argument on this point with the assertion that a claimant is protected from harassment "by his right to consolidate the cases for trial in any of the districts he may select." As noted in the previous pages in which Intervenor's answer to the Petition is set forth, the right to consolidate is an empty one.

In the first place, Petitioners are assuming that the only harassment that can arise through the institution of multiple seizures is the necessity for trial of numerous law suits. Were that the sole basis for Intervenor's claim in the District Court that the actions of the Petitioners were oppressive to the extent of permanently ruining a business, perhaps there would be merit in Petitioners' claim. But the irreparable nature of Intervenor's injuries goes much, much farther than the mere necessity of defending numerous law suits. It goes to the demoralizing effect upon Intervenor's distributing organization; to the irretrievably lost good will of the Intervenor's customers because of the stigma which attaches to Intervenor's business because of the actions of Petitioners; to the uncompensable damage to the seized products which are now valueless; to the intangible, but nonetheless, damaging effect of conducting a lawful business under the constantly prevailing fear of utter destruction; and to the very tangible losses of over $100,000 per month which have resulted from the oppressive and arbitrary actions of Peti-

tioners. No law exists to recompense Intervenor for its losses and, as the Congress recognized in House Report 2139, 75th Congress, in referring to seizures as a harsh remedy:

> "A seizure case finally decided in favor of a defendant leaves him without recourse for his losses, including court costs, storage and other charges."

Petitioners' claim that all the authorizing decision does is permit the filing of law suits, is certainly a rank understatement on the facts of damage already caused in this case, which damage the Congress clearly had in mind in imposing safeguards on the unleashing of multiple seizures—possibly hundreds in the instant case. That Petitioners further argument that such decisions are preliminary in character is entirely frivolous is shown by the tremendous irreparable damage already done to Intervenor herein by only 10 libel seizure cases. What several hundred would do if Petitioners are allowed to carry out their threats is readily foreseeable. When immediate irreparable injury follows therefrom no decision can be considered as merely preliminary in effect.

In the second place, and with further reference to the right to consolidate, that right is ineffective in the event that after one consolidation, many more seizures are made as here threatened necessitating further and similarly useless consolidations.

And in the last place, Petitioners fail to mention that in fact Intervenor cannot avail itself of the right which Petitioners say it has, namely, to consolidate "in any of the districts he may select." As adequately pointed out in detail in paragraph 19 of the amended Complaint Intervenor has been unsuccessful in obtaining a stipulation for the removal of the pending libels for trial in Los Angeles, Intervenor's home district, because of Petitioners' opposition. The right to consolidate and remove to a district selected by Intervenor just does not exist in this case, as Petitioner would have this Court believe.

II. The Special Three-Judge District Court Has Jurisdiction of the Issues Raised in the Amended Complaint

A three-judge district court is properly convened pursuant to 28 United States Code, Sections 2282 and 2284, whenever, as in the instant case, an interlocutory and permanent injunction is sought restraining the enforcement, operation or execution of an Act of Congress for repugnance to the Constitution of the United States. In this case Intervenor in its complaint has alleged that the multiple seizure provisions of Section 304(a) of the Food, Drug and Cosmetic Act as applied to it under the facts alleged in the amended complaint violates the due process clause of the Fifth Amendment by denying Intervenor a hearing before Petitioners have inflicted great and irreparable injury upon Intervenor by seizing its property. The facts alleged in the complaint insofar as relevant to this issue are that Intervenor's product is non-toxic and harmless (this Petitioners admit); that no emergency or impelling public necessity requires that summary action seizing Intervenor's property be taken without hearing; that Intervenor twice specifically requested a hearing by the Administrator before irreparable injury was inflicted upon it by summary *ex parte* action and was twice denied a hearing; that Petitioners' *ex parte* action has caused sales losses to Intervenor of $100,000 per month, has caused it to lose thousands of dollars in the value of goods seized, expenses incurred in defending seizure actions and in damage to its good will and to the morale of its national distribution organization. It is alleged that Intervenor's business will be completely destroyed by the further seizures threatened by Petitioners prior to any possible decision in any of the libel seizure actions so that a trial in such actions is not an adequate remedy to prevent the foregoing irreparable injury. Other facts are alleged but these are the chief allegations on this constitutional issue.

This constitutional issue has never been passed upon by any court except insofar as the Special Three-Judge Court

herein passed upon it in its order of April 7, 1949, "that the Defendants' motion to dismiss be and the same hereby is denied." Petitioners' major point on the motion to dismiss was its claim that this infliction of irreparable injury "without hearing" was constitutional. No decision of any Court in this Nation has ever countenanced infliction of irreparable injury by government officials without a hearing in the absence of an impelling public necessity for such injury. (See brief filed herein by Intervenor entitled "Plaintiff's Points and Authorities in Opposition to Defendants' Motion to Dismiss," pp. 15-27). Instances have been approved where governmental action is taken without hearing but only where some adequate remedy exists to prevent irreparable injury *before* such injury is inflicted. (See brief *ibid*, pp. 46-49.)

Intervenor further submits that this Honorable Court in considering the jurisdiction of three-judge courts convened under other sections of the Judicial Code has stated that if the Federal question is substantial then a three-judge court may rest its decision on any ground which in its opinion effectively disposes of the case, and that a three-judge court having once obtained jurisdiction may determine every question involved in the litigation pertaining to the prayer for an injunction, in order that a single lawsuit may afford a final authoritative decision of the controversy between the parties. *Sterling* v. *Constantin*, 287 U. S. 378.

In view of the statements and decisions of this Court, it is respectfully submitted that the Respondents once having obtained jurisdiction by the reason of a substantial constitutional question were at liberty to consider any other issue in the case.

Intervenor, in addition to alleging the unconstitutionality of the multiple seizure provisions of the Food, Drug and Cosmetic Act, has asserted that the actions of the Petitioners in instituting and causing to be instituted the various seizures were unlawful, arbitrary, capricious and unreasonable and were deliberately designed to harass

and vex and completely destroy Intervenor's business prior to a decision in any of the seizure cases. *Petitioners assiduously omit any reference to such allegation in their petition.* Intervenor suggests that upon proof that these allegations or admissions by Petitioners are true, the Three-Judge Court might dispose of the litigation on that ground and thus avoid the other constitutional question. It is with such an issue, as well as others, in view, that the Three-Judge Court has ordered a trial which will include the issue of oppressive abuse of power denying to Intervenor due process of law.

Petitioners claim that the effect of a trial on the issue as to whether or not the Plaintiff's advertising is "in a material respect misleading to the injury or damage of the purchaser or consumer" has the effect of transferring the trial of the merits of the pending libel actions to the District Court for the District of Columbia. This contention is erroneous.

In a single seizure action, the issue before the libel court is whether the labeling is "*misleading in any particular*" (21 U. S. C. § 352(a)). In multiple seizure actions, the issue before the libel court is whether the labeling is "*misleading in any particular.*" In other words, the issue is identical in both instances of single and multiple seizures.

As a condition precedent, however, to the institution of multiple seizures, there must be a decision by the Administrator that the product's labeling is "*misleading in a material respect to the injury or damage of the purchaser or consumer.*" (21 U. S. C. § 334.) For purposes of a single seizure there need be no such finding.

It cannot be said, therefore, that a trial in the libel court affords Plaintiff with a later review of the Administrator's decision that the labeling is "*misleading in a material respect to the injury or damage of the purchaser or consumer*" because the libel court does not try that issue—it tries the issue of whether the labeling is "*misleading in any particular.*"

Furthermore, the issue as to whether the advertising in question is "in a material respect misleading to the injury or damage of the purchaser or consumer" is only part of the broader issue as to whether the actions of Petitioners were arbitrary, capricious and unlawful. Such an ultimate issue is not related to the issues before the libel courts; this distinction is fundamental and is ignored by Petitioners.

It has been universally accepted that multiple seizures of innocent products amounts to oppressive conduct which infringes upon the due process of law clause of the Fifth Amendment to the Federal Constitution under the principles established in the case of *National Remedy Co.* v. *Hyde,* 50 Fed. (2d) 1066, decided on June 1, 1931, by the United States Court of Appeals for the District of Columbia. That case was and is the landmark case on this question. There, the Court was confronted with facts almost identically parallel to those of the case in which the Intervenor is the plaintiff in the 3-Judge District Court below. There, as here, multiple seizures of a harmless product had been made; there, as here, plaintiff's business was threatened with complete extinction prior to any adjudication of the merits of the controversy; and there, as here, the dispute involved the advertising used by the Plaintiff in the promotion of its product, and not the product itself. In the following language the Court significantly observed that the procedure which permitted the institution of multiple seizures was lacking in the attributes of due process:

> "In the present case, the action and proposed action of the Department would, under the averments of the bill, in effect deprive appellant of its property through the destruction of its business before the issues could be determined by the court. The result, therefore, would be little different than as though no provision had been made for judicial review. Such a course of conduct on the part of the Department amounts to arbitrary exercise of power, and is a deprivation of due process of law . . ."

Earlier the Court had observed that:

> ". . . if such certification (of facts to the Department of Justice for institution of seizures) should be made in every district where a product might be found, the manufacturer would be crippled or ruined long before the final adjudication. Such a result, we think, was not contemplated by Congress, except possibly in unusual cases where drastic action would be necessary for the immediate protection of the public. Is this a case of that character? We think not."

Without reviewing the legislative history of the 1938 Act in detail, it is clear that Congress intended the principles of justice enunciated in the *National Remedy* case to be as equally applicable under the 1938 Act. In fact, many writers agree that the limitation placed upon the multiple seizure power of the Federal Government in this case was codified into and became an integral part of the 1938 Act. This typical view was expressed by *Michael F. Markel,* the former Senior Attorney of the General Counsel's staff of the Food and Drug Division of the Federal Security Agency, when, in 1947 at the proceedings of an Institute conducted by the New York University School of Law, he stated:

> "The purpose of this provision is to avoid unnecessary interference with the business of the producers until an issue of alleged misbranding has been determined by the proper tribunal. The 1906 Act did not contain a comparable provision. However, in at least one instance (citing the *National Remedy* case) the Court enjoined the institution of more than one seizure because it appeared to the Court that an unlimited number of seizures constituted an unwarranted interference in the light of the relative importance of the issue of misbranding involved. *This section is virtually a codification of the principle of that case."* (Emphasis supplied.)

The harshness of the multiple seizures was fully recognized by Congress when it was stated in House Report 2139 (75th Cong., 3rd Sess., 1938):

> "In many instances seizure is a harsh remedy and should be discouraged and confined to those cases where the public protection requires such action."

In the light of the *National Remedy* case and of the legislative history of the Act, it can hardly be said that the oppressive and arbitrary action of Petitioners herein bears the sanction and approval of Congress and that Courts of equity were deprived of power to enjoin arbitrary, oppressive and unlawful conduct of public officials under said Act.

In essence, Petitioners contend, and have contended throughout the proceedings below, that a court of equity has no power to grant injunctive relief although the Administrator has acted arbitrarily, capriciously, unreasonably, unlawfully and in complete violation of the standards established by Congress governing the decisions of the Administrator authorizing multiple seizures. Such a contention is contrary to all established principles of jurisprudence. Furthermore, it is absurd to state that Congress has established a standard and yet contend that the Courts are powerless to determine whether or not an administrative official has arbitrarily, capriciously and unlawfully violated the Congressional mandate. Why should Congress set up any standard if there is no power in the courts to review a decision ostensibly promulgated under the established standard? The Food, Drug and Cosmetic Act does not prohibit judicial review by injunction or otherwise; and furthermore, the Administrative Procedure Act (5 U. S. C. § 1009e) provides for review where no other form of review of a decision of an administrative official is provided. This Honorable Court has constantly held that courts have jurisdiction to grant equitable relief when administrative officials, assuming to act under the warrant of Congressional authority, have in fact acted unlawfully and beyond the scope of the granted power. See *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 96; and *Lane, Secretary of Interior* v. *Watts*, 234 U. S. 525.

Under the allegations, which are to be accepted as true for the purposes of the petition before this Honorable Court, the Administrator has completely violated his statutory duty in determining that the booklet in question is in a material respect misleading to the injury or damage of the purchaser or consumer when the facts are just to the contrary. See *infra* pages 33-34 on these facts.

Under such an erroneous and unlawful decision, and with Petitioners mimeograph equipment in full working order and the names and addresses of over 5,000 of Intervenor's distributors in Petitioners' files, it would be possibe that within a week over one hundred lawsuits could be pending. Examination of Petitioners' files has disclosed that many more seizures are contemplated. Such a widescale and far-flung pattern of lawsuits would completely paralyze and wipe out a lawful business long before a possible adjudication on the merits. To contend that such an aggrieved party has no standing in court would be to frustrate the basic principles upon which our law has been founded. No administrative official is above the law. In *Garfield* v. *Goldsby*, 211 U. S. 249, 252, an erroneous order of the Secretary of the Interior was cancelled where, without statutory authority he struck the name of an enrollee from the roles of an Indian Nation. The Court said in part:

> "But, as has been affirmed by this Court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the Courts to restore the status of the parties aggrieved by such unwarranted action."

III. Judge Pine's Decision Did Not Take from the Three-Judge Court Jurisdiction to Consider all Allegations in the Amended Complaint.

Contrary to Petitioners' contentions in paragraphs 10 and 11 of their Petition, Judge Pine's ruling upon the original complaint was not binding upon the Three-Judge Court when that Court had before it in the amended complaint

matters previously considered in Judge Pine's ruling. The Three-Judge Court had the power to consider, if it were so disposed, all the allegations of the amended complaint and to consider Judge Pine's ruling erroneous. The right to adopt such a course was sanctioned by this Honorable Court in *Post* v. *Pearson*, 108 U. S. 418. There, in an action on a contract, the defendant's demurrer to the complaint was sustained and the plaintiff given leave to amend. At the trial the court declined to rule and instruct the jury, as the defendant requested, that the order sustaining his demurrer to the original complaint prevented a recovery against him in the action. This Court stated:

> "The order sustaining Post's demurrer to the original complaint gave the plaintiff leave to amend, and did not preclude the plaintiff from renewing, nor the court from entertaining, the same question of law upon a fuller development of the facts at the trial on the amended complaint."

Similarly, in *Marks* v. *Frigidaire Sales Corporation*, 60 App. D. C. 359, 54 F. (2d) 974, cert. den. 285 U. S. 544, the United States Court of Appeals for the District of Columbia indicated that the action of a motions judge in sustaining a demurrer to a plea did not bind the trial judge. The Court stated:

> "And, while it is highly desirable and convenient that rulings on demurrers and other interlocutory matters should settle the law of the case as it proceeds, yet, when parties plead over and go to final hearing upon the law and facts, prior interlocutory rulings are not res adjudicata, as the plaintiff in error calls them, and are not conclusive on the trial judge who has the ultimate responsibility, as the case is finally presented to the trial court for decision."

As stated in 3 Fed. Cyc. §689 "the expressions of the Supreme Court and of inferior federal courts leave no question that federal courts do not apply the doctrine of the

law of the case as a rule of law limiting the power of the court to reopen what has been decided."

The phrase, "law of the case," merely expresses the practice of courts generally to refuse to reopen what has been decided. It does not limit their power to reopen such an issue. *Messenger* v. *Anderson*, 225 U. S. 436; *Remington* v. *Central Pacific R. R. Co.*, 198 U. S. 95. However stringent may be the practice of refusing to reconsider what has been done, it is nevertheless only a practice and does not proceed from any absence of jurisdiction. *Remington* v. *Central Pacific R. R. Co., supra.* Thus there is a distinction between the law of the case and *res adjudicata*; the one merely directs discretion, while the other supercedes it and compels judgment. *Southern Railway Co.* v. *Clift*, 260 U. S. 316. The law of the case is not an inexorable command and must not be utilized to accomplish an obvious injustice, *Cochran* v. *M. & M. Transp. Co.*, 110 F. (2d) 519, (C. C. A. 1st 1940) nor will it prevent a different conclusion if a clear case is presented that the initial ruling was plainly wrong. *Brown* v. *Gesellshaft Fur Drahtlose Telegraphie, M. B. H.*, 70 App. D. C. 94, 104 F. (2d) 227, (1939) cert. den. 307 U. S. 640.

It is sufficient that the Three-Judge Court had the power to reconsider the ruling of Judge Pine even where the original complaint and the amended complaint were identical insofar as the allegations of arbitrary and capricious action are concerned. But the amended complaint presented a different situation and alleged different facts, so that the doctrine of the law of the case is entirely inapplicable. As stated in 3 Fed. Cyc. § 689, Page 316:

> "Accordingly, a ruling on an answer or motion in the nature of a demurrer or a motion testing pleadings by way of sufficiency or upon a motion to grant or deny an injunction or on an issue such as laches, is the law of the case upon the same facts; but not as to matters beyond the scope of the decision made upon such ruling, or after or upon other pleadings."

The amended complaint before the Three-Judge Court contained the following new allegations which were not before Judge Pine: (1) that nothing contained in the advertising in dispute is in any respect misleading to the injury or damage of any purchaser or consumer (Amended Complaint, Paragraph 3); (2) that the libels filed have already directly caused Plaintiff's business to diminish from a gross volume of over $500,000 per month to a volume of approximately $400,000 per month, that said libels have caused great and irreparable damage to the good will of Plaintiff's business and have greatly and irreparably damaged the morale and efficiency of Plaintiff's national distribution organization and that if the threatened libels are filed and Plaintiff's product seized thereunder Plaintiff's good will and business will be almost completely destroyed and irreparably injured before Plaintiff can obtain a hearing and adjudication of the lawfulness of its labeling (Amended Complaint, Paragraph 12); (3) that the Plaintiff's products already seized have a retail value of several thousands of dollars (Amended Complaint, Paragraph 14); (4) that Plaintiff's distributors number approximately 5,000 (Amended Complaint, Paragraph 14); (5) that the prosecution of the libels in widely separated parts of the United States is deliberately calculated by Defendants to be oppresive and will ruin and destroy the good will and business of the Plaintiff (Amended Complaint, Paragraph 16); (6) that prior to the institution of multiple libels there had been no judgment in favor of the United States in any proceedings against Plaintiff (Amended Complaint, Paragraph 17); (7) that the Administrator of the Federal Security Agency was twice requested to grant Plaintiff a hearing upon the merits of its advertising and that such request was twice denied (Amended Complaint, Paragraph 18A); (8) that there is no emergency requiring summary action against Plaintiff's product and that no one would be injured if Defendants are enjoined from instituting further libel actions and from proceeding with the existing libel actions other than the first until

the first has been finally determined (Amended Complaint, Paragraph 18B); (9) that Plaintiff has no plain, adequate or complete remedy at law to prevent the injury and threatened injury complained of (Amended Complaint, Paragraph 24); (10) that all libels instituted by Defendants after the first libel are unlawful and void because they were not predicated upon a decision of probable cause by the Administrator of the Federal Security Agency as required by Section 304(a) of the Food, Drug and Cosmetic Act (Amended Complaint, Paragraph 25); (11) that the Defendant Tom C. Clark, as Attorney General of the United States, is responsible for the institution of the multiple libel actions against Plaintiff and that the libel actions other than the first are illegal and void and have been instituted by joint action of the Defendants in violation of Section 304(a) of the Food, Drug and Cosmetic Act and the Fifth Amendment to the Constitution of the United States, in excess of Defendants' lawful authority (Amended Complaint, Paragraph 26).

IV. Mandamus and Prohibition are Drastic and Extraordinary Remedies and Such Writs Should Not be Issued Here Where a Lack of Jurisdiction is not Shown and Petitioners' Remedy by Appeal is Adequate.

The most recent pronouncements of this court emphasize that mandamus and prohibition are drastic and extraordinary remedies reserved for really extraordinary causes where appeal is a clearly inadequate remedy. *Ex parte Fahey*, 332 U. S. 258. Furthermore, such writs will not issue unless a lower court is clearly in error in assuming jurisdiction of a cause or some collateral matter in issue. Intervenor's argument as to the jurisdiction of the Special Three-Judge District Court are included in another section of the brief.

Under the Judicial Code, Petitioners are given a right of appeal directly to this Honorable Court, not only from any final decree or determination of a Three-Judge District Court convened under Sections 2282 and 2284 of the Judicial Code, but also from any interlocutory injunction issued

by a Three-Judge District Court. Furthermore, such appeals are given precedence over other matters.

Petitioners insist, although erroneously, that the temporary restraining order issued by the Respondents is in fact a temporary injunction. If Petitioners were sincere in this contention, immediate steps could have been taken to expedite an appeal to this Court. Such has not been the case.

Petitioners assert that appeal would not be an adequate remedy to protect the public interest. Intervenor respectfully submits that the public-interest argument is without merit as applied to the product and advertising involved in the litigation below. Any argument as to a threat to the public may only be resolved by a trial considering the nature of the advertising which has given rise to this controversy. Undoubtedly this question, although only a part of the broader issue, was to have been considered by Respondents in the trial which had been set for May 9, 1949. Petitioners by seeking the relief requested herein and by asking the stay of all proceedings below have delayed any determination of a fact they ardently, but erroneously, assert at least for the purposes of the cause before this Honorable Court. But for Petitioners' appeal to this Honorable Court the trial in the Three-Judge Court would be over and the case could have probably been decided and on its way to this Court by the speedy appeal procedure specially provided in the Statute.

To further rebut Petitioners' argument that the public interest is involved, it is significant to note that Petitioners have been acquainted with the advertising in question for several years but failed to take any action until September, 1948, when the deluge of multiple seizures began. If the public interest were so great, Petitioners would have certainly acted more promptly.

It is also to be noted that Section 302 of the Food, Drug and Cosmetic Act permits the Petitioners to seek injunctive relief under certain circumstances. If public-interest were seriously involved, it is difficult to reconcile the failure of the Petitioners to avail themselves of the expeditious and effective remedy available by injunction. Rather than

seek an effective remedy, Petitioners have resorted to the "shot-gun" technique of multiple seizures in widely scattered jurisdictions simply on the ground that certain advertising is misleading. Petitioners evidently are more interested in punishing Intervenor by such wide-spread seizures than in their trumped-up public protection smoke screen as only an injunction could stop all sales of a product at the source.

No claim has ever been made that the product involved is dangerous or fraudulent. In fact, the sworn medical testimony of a Medical Doctor employee of Petitioners admits that the product would be effective in the treatment of vitamin and mineral deficiency diseases. (Deposition of Dr. Robert C. Butz, April 25, 1949.) Intervenor respectfully submits that Petitioners by their own conduct rebut the public-danger argument and thus the remedy of appeal given by law is clearly adequate.

It is obvious that a trial is necessary to determine not only the substantial constitutional question raised below, but also to determine other issues properly before the Court. The writs of prohibition and mandamus should not be used in anticipation of an adverse decision, which may or may not be erroneous. The proper procedure for correcting error is appeal. Petitioners thus seek herein to circumvent and by-pass a procedure established and required by law and request relief reserved for most extraordinary cases.

In addition to having an adequate remedy by appeal, Petitioners fail to establish that circumstances are such that the Special Three-Judge District Court is *clearly* without jurisdiction in the matter in question. Without such a showing, a writ of prohibition will not issue. Even if it could be shown (as Petitioners certainly have not) that the jurisdiction of the Three-Judge Court to order the trial herein complained of is doubtful the extraordinary remedies sought herein should be denied. Petitioners cannot show with any degree of certainty that their contentions about possible exercise of erroneous jurisdiction by the Three-Judge Court are at all justified by the record.

To secure the grant of an extraordinary writ, the Petitioners must show a clear exceeding of jurisdiction. Petitioners have failed in this essential requirement.

V. Intervenor Has a Right to Issue a Pamphlet Discussing the Truth of "Deficiency Diseases" and the Value of Vitamins, and Petitioners' Acts of Attempted Suppression Constitute an Infringement of Intervenor's Rights of Freedom of Speech and Press.

While not argued in the Court below there is another part of the broad issue in this case of oppressive abuse of power by Petitioners which deserves consideration, for it requires a trial to develop the essential facts so that it may be urged under the decisions of this Court.

Intervenor has written into its sales booklet, which the Petitioners attack, *the truth* about the existence of what are known to the medical profession as "deficiency diseases." Attached to Intervenor's First Request for Admissions herein (see record of papers filed by Petitioners) are excerpts from the authorities in the medical field verifying all that Intervenors have said about the symptoms of these diseases and the value of vitamin products, such as Nutrilite Food Supplement, for such diseases. The Petitioners' own doctor, Robert C. Butz, in his deposition of April 25, 1949, confirms everything that the booklet and those authorities say about deficiency diseases, their symptoms and the value of the various vitamins for these diseases—in fact, it was seemingly immediately after Dr. Butz did this that the Petitioners decided to file the instant petition.

The Petitioners in general admit, as they must, the foregoing facts but claim they have formed an "opinion" that the booklet is misleading in a material respect to the injury of the purchaser or consumer. J. Donald Kingsley, Acting Administrator of the Federal Security Agency, who made the latest decisions authorizing multiple seizures of Nutrilite was specifically asked:

> "Were you presented with any facts showing that Nutrilite or its labeling had injured or damaged any purchaser or consumer?"

And his answer, over objection of Petitioners' Counsel, was:

> "No, Sir" (pp. 10-11)..

Mr. George P. Larrick, Associate Commissioner of Food and Drugs, who is in general charge of a part of the enforcement work of the Administration, was asked:

> "But you know of no facts showing that anyone has actually been injured by Nutrilite's labeling?
> "Answer. No, I have no such knowledge" (p. 24).

It is most respectfully submitted that under these facts Petitioners are attempting to suppress freedom of speech and freedom of the press just because they in their "opinion" say they draw a conclusion from Intervenor's pamphlet, which is obviously based upon *opinion alone* rather than any facts. Evidently the Petitioners claim that in their opinion Intervenor's pamphlet is not orthodox—yet this Court has held repeatedly that freedom of speech and of the press may only be prevented by public officials to *prevent grave and immediate danger, Winters* v. *New York,* 333 U. S. 507; *United States* v. *C. I. O.,* 335 U. S. 106; *West Virginia* v. *Barnett,* 319 U. S. 624. No such danger is present on the facts of the instant case. In *Hannegan* v. *Esquire Magazine,* 327 U. S. 146 at 158, this Court said:

> "a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system . . ."

It is true that freedom of speech and of the press may be restricted but the restrictions are well defined and narrowly limited, and they include the loud and obscene, the profane, the libelous and the insulting and fighting words which by their very utterance, inflict the injury or tend to incite an immediate breach of the peace. *Chaplinsky* v. *New Hampshire,* 315 U. S. 568. Admittedly, therefore, Intervenor's constitutional freedoms may be limited if neces-

sary to protect the public, but the facts in this case show it is *Petitioners' opinion versus Intervenor's opinion* with the medical authorities agreeing with Intervenor. In both the *Winters* and *Hannegan,* cases *supra* the public authorities claimed the same kind of indirect danger based upon their opinion of what is good for the public which the Petitioners herein rely upon.

In this situation it is most respectfully submitted that the Special Three-Judge Court can consider whether Intervenor's freedom of speech and press have been denied by the oppressive conduct of Petitioners—if necessary, proper amendments to the Complaint could be allowed by the Court under the liberal Federal Rules of Civil Procedure to conform to the facts shown at the trial with a specific reference to the First Amendment of the Constitution of the United States.

CONCLUSION

It is, therefore, respectfully submitted that the writs of prohibition and/or mandamus prayed for herein by Petitioners should be denied by this Court for the reasons hereinabove set forth.

Respectfully submitted,

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No. 597, Misc. IN RE FEDERAL SECURITY ADMINISTRATOR AND THE ATTORNEY GENERAL OF THE UNITED STATES. On petition for writs of prohibition and/or mandamus. Argued and decided May 16, 1949. *Per Curiam:* The rule to show cause is discharged and the petition for writs of prohibition and/or mandamus is denied. MR. JUSTICE DOUGLAS dissents. *Robert L. Stern* argued the cause for petitioners, and *Solicitor General Perlman* was on the petition. *Walter M. Bastian* argued the cause and was on the return to the rule to show cause for Clark, Associate Judge, et al., respondents. *Charles S. Rhyne* argued the cause and was on the answer for Mytinger & Casselberry, Inc., intervenor.

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